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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 508

SCRIPPS-HOWARD RADIO, INC.,

vs.

FEDERAL COMMUNICATIONS COMMISSION

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

FILED AUGUST 13, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7657

SCRIPPS-HOWARD RADIO, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

Certificate—Filed August 8, 1941

The United States Court of Appeals for the District of Columbia certifies that the record in the above entitled case discloses the following:

STATEMENT OF FACTS

The appellant is an operator of a radio broadcasting station, WCPO, in Cincinnati, Ohio, licensed by the Federal Communications Commission on a frequency of 1200 kc. at 250 watts power, unlimited time. It is alleged that, without a hearing and without notice to appellant, the Commission granted a construction permit to Station WCOL, Inc., licensee of WCOL, a local station at Columbus, Ohio, authorizing it to install the necessary equipment to change its frequency from 1210 kc. to 1200 kc. and to increase its power from 100 to 250 watts, unlimited time. The appellant filed with the Commission an application for a "hearing or rehearing" and also a request that the grant to WCOL be stayed pending the disposition of such applica-
[fol. 2] tion. The Commission denied the application for a "hearing or rehearing" and thus rendered effective the construction permit. Appellant appealed from the order of the Commission granting the permit to WCOL, Inc., and from the order denying its application for a "hearing or rehearing", and it filed its petition for an order to be entered by this court staying the Commission's action pending the appeal. In its reasons for appeal, the appellant alleged in substance and effect that: the Commission was not authorized to grant an application for the construction permit without a public hearing; that in the instant case its action was contrary to its own rules as prescribed in its

guidebook "Standards of Good Engineering Practice"; that if afforded a hearing appellant would show that the Commission's action was not in the public interest and would materially reduce appellant's coverage and result in depriving the listening public of the only local regional non-network service available; that the action of the Commission in refusing a hearing is a violation of the due process clause of the Fifth Amendment.

This court had consistently over a long period of years, and without objection on the part of the Commission, issued [fol. 3] stay orders in cases in which such action was necessary in aid of this court's appellate jurisdiction, but in the instant case the Commission opposed the issuance of a stay order on the ground that this court has no power to issue such an order to the Commission in any case. It relied particularly upon the fact that the Communications Act, which gives to this court power to review the decisions of the Commission upon matters of law, is silent concerning the issuance of stay orders pending the determination of appeals; and argued, therefrom, that as the Act failed, expressly, to grant such power, it must have been the intention of Congress to withhold it. The appellant, on the other hand, relied upon the general grants of power contained in Section 262 of the Judicial Code and Section 33 of Title 18 of the District of Columbia Code, together with the consistent practice of this court.

On November 15, 1940, the application for stay in this case and another case was heard on argument by this court, [fol. 4] sitting as a court composed of three judges. Thereafter, on February 3, 1941, a written opinion was rendered, in which the contention of the Commission was upheld and the requests for stay orders in both cases were denied. One judge, however, dissented. Copies of the opinion and of the dissenting opinion are attached hereto and made part of this certificate. Thereafter, the application in the present case was set for rehearing, and on April 7, 1941, was then heard by all of the six members of this court. Being unable to agree upon a decision, the judges being equally divided, and the matter being one of importance, this court, therefore, respectfully submits the following question of law arising upon the record, an answer to which is necessary for a proper disposition of the case to the end that a correct result may be reached, and desires the instruc-

tion of the Supreme Court of the United States upon said question, to-wit:

QUESTION CERTIFIED

Where, pursuant to the provisions of Section 402(b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order [fol. 5] from which the appeal was taken, pending the determination of the appeal?

D. Lawrence Groner, C. J.; Harold M. Stephens, J.; Justin Miller, J.; Fred M. Vinson, J.; Henry W. Edgerton, J.; Wiley Rutledge, J.

August 8, 1941.

[fol. 6] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7657

SCRIPPS-HOWARD RADIO, INC., Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 7699

PUGET SOUND BROADCASTING COMPANY, INC., Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petitions for Stay Order

Decided February 3, 1941

Paul M. Segal, George S. Smith, and Harry P. Warner, all of Washington, D. C., for appellant in No. 7657.

Ben S. Fisher, of Washington, D. C., for appellant in No. 7699.

William J. Dempsey, William C. Koplovitz, Telford Taylor, and Benedict P. Cottone, all of the Federal Communications Commission, for appellee in No. 7657.

Telford Taylor and Benedict P. Cottone, both of the Federal Communications Commission, for appellee in No. 7699.

Before Stephens, Miller and Rutledge, Associate Justices

OPINION—Filed February 3, 1941

MILLER, Associate Justice:

We have concluded that no stay orders should be entered in these cases. We look to Section 402(b) of the Communications Act [1] for definition of our appellate jurisdiction. Neither in that section nor elsewhere in the Act do we find legislative authorization for the stay, by the United States Court of Appeals for the District of Columbia (formerly the Court of Appeals of the District of Columbia), of any action of the Commission, pending appeal. In sharp contrast we find that Congress incorporated by reference into Section 402(a) of the Act, express provision for the granting of stays by district courts in suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission except those of which this court was given appellate jurisdiction.[2] That this was not the result of legislative oversight seems apparent from the legislative history of Section 402. Approximately one year before the adoption of the Act of 1934, of which the present Section 402 is a part, Congress passed a bill which conferred upon this court power to issue [fol. 7] stays in connection with appeals from the Communications Commission. That bill was pocket vetoed.[3] The provision referred to was omitted from the 1934 Act. This constitutes persuasive evidence that such power was

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[1] Act of June 19, 1934, 48 Stat. 1093, 47 U. S. C. A. § 402 (b).

[2] 48 Stat. 1093, 50 Stat. 197, 47 U. S. C. A. § 402(a); 38 Stat. 220, 28 U. S. C. A. § 47.

[3] This bill (H. R. 7716, 72d Cong., 1st Sess.) contained the following provision: "(f) The court may, subject to the foregoing limitation, upon notice to the commission and to all other parties to the appeal, after hearing, and for good cause shown, enter an order staying an action of the commission under the order appealed from, in whole or in part,

withheld deliberately by Congress. Further evidence of the legislative intent is found from the fact that in a number of acts, providing for appeals from administrative agencies, express provision is made for the issuance of stay orders.[4] Moreover, the legislative intent, as revealed in other sections of the Communications Act, seems inconsistent with the contention that this court was intended to have power to issue stay orders in such cases as the present. Thus, in Section 405 it is provided that no application for a rehearing by the Commission "shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission." Here is clear evidence of legislative intent that these administrative orders shall be speedily enforced, and automatic stays, which might operate in ordinary court proceedings, are expressly forbidden. It can hardly be doubted, in view of this provision and others previously noted, that Congress had clearly in mind, throughout its deliberations, the matter of stay orders, and that it deliberately withheld such power from this court.[5]

In fact, the failure of appellants to request that the Commission stay its own orders, pursuant to applicable provisions of the Act, may very well have constituted a failure

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upon the giving of a bond by the party applying for the stay in such amount and with such terms and conditions as the court may deem proper. Pending a hearing upon the application for stay, the court may enter a temporary stay for a period of not to exceed fifteen days." After passing both houses, this bill was pocket-vetoed by the President, March 4, 1933. See Index, 72d Cong., 2d Sess. 249, for history.

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[4] E. g., National Labor Relations Act of July 5, 1935, 49 Stat. 454, 29 U. S. C. A. § 160(e) et seq.; Securities Act of May 27, 1933, 48 Stat. 81, 15 U. S. C. A. § 77i; Natural Gas Act of June 21, 1938, 52 Stat. 831, 15 U. S. C. A. §717r; Bituminous Coal Act of April 26, 1937, 50 Stat. 85, 15 U. S. C. A. § 836(b); Federal Power Act of August 26, 1935, 49 Stat. 861, 16 U. S. C. A. § 825(l); Federal Alcohol Administration Act of August 29, 1935, 49 Stat. 980, 27 U. S. C. A. § 204h; Civil Aeronautics Act of June 23, 1938, 52 Stat. 1024, 49 U. S. C. A. § 646d.

[5] See also, §§ 204, 312(a), 312(b), 408, 416(b).

to exhaust administrative remedies, which would in itself bar relief by judicial review; to say nothing of judicial stay orders. Even appellant's anticipation that such requests would be futile constitutes no excuse for failure to seek such available administrative remedies.[6]

It is contended that this court has power, nevertheless, to issue stay orders in the present cases by virtue of Section [fol. 8] 262 of the Judicial Code,[7] and Section 33 of Title 18 of the District of Columbia Code.[8] It is argued in support of this contention that there is inherent power in the United States Court of Appeals, to preserve the status quo pending determination of the appeal, in order to protect its appellate jurisdiction. We think that both sections, whatever their scope and applicability, speak in terms of the conventional relationship which exists between appellate courts and trial courts in the federal judicial hierarchy. That relationship does not exist between this court and the Communications Commission.[9]

There is no absolute, inherent[10] power to stay even the actions of courts in all cases; and this is especially true where the public interest is involved. The rationale of stay orders and injunctions is that they should be granted only when necessary to protect rights against injuries otherwise

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[6] Red River Broadcasting Co., Inc. v. Federal Communications Commission, 69 App. D. C. 1, 7, 98 F. (2d) 282, 288, cert. denied, 305 U. S. 625.

[7] Act of March 3, 1911, 36 Stat. 1162, 28 U. S. C. A. § 377: "* * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Act of March 3, 1901, 31 Stat. 1227: "The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction."

[9] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134; Federal Communications Commission v. Columbia Broadcasting System, (No. 39, decided November 25, 1940) — U. S. —.

[10] See Frankfurter and Greene, Congressional Power over the Labor Injunction, 31 Col. L. Rev. 385, 407-408.

irremediable.[11] Such power should not be exercised to enforce a right which is doubtful, or to restrain an act, the injurious consequences of which are trifling.[12] Moreover, when the exercise of such power would be prejudicial to the public interest, a court may refuse thus to protect private rights.[13] When such rights as exist are created by a statute which also declares the remedy, and in doing so fails to provide for stay or injunction process, then the courts should refrain from the use of such process, under the rule that the statutory remedy is exclusive.[14] Where a public interest primarily is involved; where no property [fol. 9] right exists; where such private interest as may exist is secondary and subordinate to the public interest;

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[11] State Corporation Commission v. Wichita Gas Co., 290 U. S. 561, 568. See Beal v. Missouri Pac. R. R. (No. 72, decided January 20, 1941) — U. S. —; Terrace v. Thompson, 263 U. S. 197, 214; Cavanaugh v. Looney, 248 U. S. 453, 456.

[12] See Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 302.

[13] United States v. Morgan, 307 U. S. 183, 194: "* * * the extent to which a court of equity may grant or withhold its aid * * * may be affected by the public interest involved."

Petroleum Exploration, Inc. v. Public Service Commission, 304 U. S. 209, 222-223: "The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant."

Cf. United States ex rel. Greathouse v. Dern, 289 U. S. 352, 359, 360; Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 552; McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 9 Cir., 164 F. 927, cert. denied, 212 U. S. 583; Bliss v. Anaconda Copper Mining Co., D. Mont., 167 F. 342, aff'd sub nom. Bliss v. Washoe Copper Co., 9 Cir., 186 F. 789, appeal dismissed, 231 U. S. 764. See Note, 36 Harv. L. Rev. 211.

[14] See D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165, 174-175; United States v. Babcock, 250 U. S. 328, 331; United States v. American Bonding Co., 42 App. D. C. 268, 271; Curran v. Delano, 235 Pa. 478, 84 A. 452.

where, as here, an administrative agency has made a determination in the public interest; and where only a question of law is presented on appeal; the issuance of a stay order would seem to constitute an unwarranted interference with administrative action. This is true of injunction process.[15] It would seem to be even more true of the issuance of stays pending appeal; especially where the jurisdiction on appeal is so limited as it is under Section 402(b) (2) of the Communications Act.

The legislative trend is toward restriction of the use of injunction process. A recent striking example is found in the Norris-La Guardia Act,[16] and there are other similar

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[15] See In re Sawyer, 124 U. S. 200, 210: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government." At p. 213, the Court quotes with approval from Sheridan v. Colvin, 78 Ill. 237, 247: "It is elementary law, that the subject matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political nature come within the jurisdiction of the Court of Chancery. Nor has the Court of Chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." Rule of Sawyer case followed in Davis and Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 218, and International News Service v. Associated Press, 248 U. S. 215, 236.

[16] Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. A. § 101 et seq.

statutory limitations of less recent enactment.[17] Self-imposed judicial restraint is commendable, also, whenever a stay order is sought for the purpose of aborting administrative action, unless the law and the facts reveal, clearly, the propriety as well as the power of judicial interference; even in the conventional setting of an appeal from a district court. Thus, for example, in Lukens Steel Co. v. Perkins,[18] the appeal was from a judgment of the District Court; which in turn was based upon pleadings which asserted rights and injuries thereto. On the face of the pleadings this may have seemed to present a situation squarely within the terms of Section 262 of the Judicial Code,[19] and Section [fol. 10] 33 of Title 18 of the District of Columbia Code.[20] Yet, as a careful review of the facts and of the law revealed that the administrative action there involved related only to a matter exclusively executive in character, and as, consequently, the individual appellants had neither private right nor standing in court to sue or appeal, there was no jurisdiction to issue a stay order.[21]

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[17] See, e.g.: Courts of the United States cannot stay proceedings in any court of a state (Jud. Code § 265, 36 Stat. 1162, 28 U. S. C. A. § 379); suits to restrain assessment or collection of taxes shall not be maintained (Rev. Stat. § 3224 —now 53 Stat. 446, 26 U. S. C. A. § 3653); no injunction shall be granted restraining any state officer from enforcing a state statute on the ground that it is unconstitutional, unless certain procedure is followed (36 Stat. 557, 1162, 37id. 1013, 43 id. 938, 28 U. S. C. A. § 380); same as to restraining any Act of Congress (50 Stat. 752, 28 U. S. C. A. § 380a); Clayton Act restrictions (38 Stat. 738, 29 U. S. C. A. § 52).

See also, Frankfurter and Greene, The Labor Injunction (1930) 150-182, 206; Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345; Hutcheson, Jr., A Case for Three Judges, 47 Harv. L. Rev. 795.

[18] 70 App. D. C. 354, 107 F. (2d) 627, rev'd, 310 U. S. 113.

[19] Supra n. 7.

[20] Supra n. 8.

[21] Perkins v. Lukens Steel Co., 310 U. S. 113. Judicial recognition of the trend toward a more restrictive use of injunctions is again illustrated by the recent case of L. Singer & Sons v. Union Pacific R. R., (No. 34, decided December 16, 1940) — U. S. —. In that case, plaintiff sought

The Supreme Court has held that the field of broadcasting is one of free competition and that: "The policy of the Act is clear that *no person is to have anything in the nature of a property right* as a result of the granting of a license."[22] [Italics supplied] As the Act itself provides that no station license shall be granted "until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States * * *",[23] it is obvious that no person, licensee or otherwise, has anything in the nature of a property right which can be asserted against the regulatory power of the United States or against the Commission—which is its administrative agency for that purpose—when it is engaged in the activities enumerated in Section 402(b).

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an injunction to prohibit the construction of a spur track, relying on paragraph 20 of Section 402 of the Transportation Act of 1920 (42 Stat. 478, 49 U. S. C. A. § 1(20)), which allows such a suit by the United States, the Interstate Commerce Commission, any commission or regulating body of the state or states affected, or "any party in interest." Justice McReynolds, speaking for the Court, said: "Such a suit cannot be instituted by an individual unless he 'possesses something more than a common concern for obedience to law.'" In a concurring opinion—joined by Justices Roberts, Black, Douglas and Murphy—Justice Frankfurter said: "It is reading § 1(20) without illumination of the scheme and purposes of the Transportation Act to expand the categories of public agencies explicitly named by Congress for enforcing § 1(18) by including a city as a 'party in interest.'" Further, Justice Frankfurter said: "* * * to allow any private interest to thresh out the complicated questions that arise out of § 1 (18-22) * * * is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues. * * * These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts."

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[22] Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470, 474, 475.

[23] 48 Stat. 1083, 47 U. S. C. A. § 304.

It is true, as the Supreme Court pointed out in the Tennessee Valley Authority case, that there may be, in addition, three other forms of legal rights, i. e., "one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[24] No doubt it was the last mentioned of these three that was within the contemplation of Congress when it enacted the Communications Act.[25] Apparently the Supreme Court had

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[24] Tennessee Elec. Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 137.

[25] "Sec. 301. * * * no such license shall be construed to create any *right, beyond the terms,* conditions, and periods of the license."

"Sec. 309. * * * (b) * * * (1) The station license shall not vest in the licensee any *right* to operate the station nor any *right* in the use of the frequencies designated in the license *beyond the term* thereof nor in any other manner than authorized therein.

"(2) Neither the license nor the *right granted thereunder* shall be assigned or otherwise transferred in violation of this Act [chapter]."

"Sec. 310. * * * (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the *rights* therein granted shall not be transferred, assigned, or * * * disposed of * * * unless the Commission shall * * * decide that said transfer is in the public interest, and shall give its consent in writing."

"Sec. 313. * * * Whenever in any suit, action, or proceeding * * * any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court * * * may adjudge * * * that the license of such licensee shall * * * be revoked and that all *rights* under such license shall thereupon cease. * * *."

"Sec. 319. * * * (b) * * * The *rights* under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. * * *"

"Sec. 606. * * * (c) Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all

in mind, also, the same form of right, in statements which [fol. 11] it incorporated into its opinions in the Nelson Brothers case [26] and in the Pottsville case.[27] Such an in-

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stations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the *owners*.

"(d) The President shall ascertain the *just compensation for such use or control* and certify the amount ascertained to Congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, *such person* shall be paid only 75 per centum of the amount and *shall be entitled to sue the United States* to recover such further sum as added to such payment of 75 per centum will make such amount as will be *just compensation* for the use and control. Such suit shall be brought in the manner provided by paragraph 20 of section 41 of Title 28, or by section 250 of Title 28." (Italics supplied.)

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[26] Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 278: "When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, *and to have their rights, as established by law*, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power." (Italics supplied.) And in the same case (p. 282) the Supreme Court pointed out that while operators of radio stations had no right superior to the exercise of the Commission's power of regulation, and "made their investments and their contracts in the light of, and subject to, this paramount authority;" nevertheless, in making the necessary adjustments of service (p. 285), "the equities of existing stations undoubtedly demand consideration"

[27] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 137, 138: "No license was to be 'construed to create any right beyond the terms, con-

terest is sufficient to support the standing of an existing [fol. 12] licensee to appeal, as was held in the Sanders case.[28] But that interest, arising from a privilege conferred under the statute, is subordinate to the primary interest of the public in radio broadcasting. The considerations set out in the minority opinion herein were fully considered by this Court in the Yankee Network case;[29] they must have had the attention of the Supreme Court in the Sanders case, and they all seem to be put to rest definitively by that decision.[30] The important consideration is that although the Court recognized rights or interests in a licensee sufficient to give standing to appeal, it denied that such a licensee was entitled to protection against competition; or

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ditions, and periods of the license.' * * * Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the *protection of private as well as public interest.* * * * Thus, it is highly significant that although investment in broadcasting station may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of 'public convenience, interest, or necessity.' The Communications Act is not designed *primarily* as a new code for the adjustment of *conflicting private rights* through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." (Italics supplied.)

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[28] Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470, 477.

[29] Yankee Network, Inc. v. Federal Communications Commission, 71 App. D. C. 11, 15-16, 107 F. (2d) 212, 216-217.

[30] Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470.

to resist the grant of a license to another on that ground; and held that the Commission was required to consider the question of financial injury, and make findings thereon, only so far as it concerned the public interest. This being true the conclusion seems inescapable that if such rights or interests are so secondary, subordinate and unprotectable on appeal, they must be equally unprotectable by a stay order pending appeal. What useful purpose could be served by preventing the grant of a license to another, because of competition or financial injury, up to the time of a judgment by this Court, when by the judgment itself no such protection could be afforded?

Neither is it disputed that great investments have been made in these radio broadcasting stations[31] and in the industry which has grown up in connection with them; nor that these investments have value only as a result of the privileges which are extended by the Government in the form of licenses; nor that unlike other forms of freely competitive business, including newspapers and other media, the enjoyment of these investments and the carrying on of business by those engaged in this great industry would constitute criminal conduct except under licenses so granted by the Government.[32] Nevertheless, as the public has a paramount interest in radio broadcasting; as provision for the protection of that interest has been made by the regulatory provisions of the Communications Act; as Congress has created a Commission for that purpose, whose primary duty is to act in the public interest; as Congress has limited the right of appeal under Section 402 (b) to the scant purpose of bringing to the attention of the appellate court errors of law in the action of the Commission; such private rights and interests as may exist are clearly secondary to [fol. 13] the interest of the public. Consequently, on appeals under Section 402 (b) no private interest can be presented to this court, or considered by it, except as it may incidentally relate to some proper legal question affecting the public interest; and it may be considered, even then, only for the purpose of answering those questions in the public interest.

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[31] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 138.

[32] 48 Stat. 1100, 47 U. S. C. A. §§ 501, 502.

That such private interests may be vitally affected or perhaps, in exceptional cases destroyed,[33] as a result of the Commission's actions, is regrettable but unavoidable.[34] One who engages in an industry in which the public has a paramount interest, and in connection with which it withholds the privilege of appeal from administrative action, assumes these risks. In the absence of express or implied legislative recognition of right and provision for appeal, one who suffers under such a law is able to show no more than a mere possible injury to the public; he must look to the political process for relief.[35] In the situation which existed in the Lukens Steel case, Congress withheld entirely any private right or privilege, as well as standing to appeal, in order to insure expeditious administrative action. In the present cases, as the Sanders decision holds, it granted a limited privilege, and provided for a limited appeal, intended merely to bring to the attention of the appellate court errors of law in the actions of the Commission. Certainly it cannot be assumed, in the light of the various considerations heretofore set out, that in doing so it intended to prevent expeditious administrative action by making applicable to the Communications Commission

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[33] Alabama Power Co. v. Ickes, 302 U. S. 464, 479-480: "The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria*. Stated in other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results."

[34] Brandeis, The Curse of Bigness (1934) 140-141: "American development can come on the lines on which we seek it, and the ideals which we have can be attained, only if side by side with political democracy comes industrial democracy. It is the relatively small man who pre-eminently needs the aid and the solicitous care of industry and of government."

[35] Perkins v. Lukens Steel Co., 310 U. S. 113, 132, 125.

the stay order procedure—with the "delays necessarily incident to judicial scrutiny"[36]—which is designed for use in the settlement of controversies between private litigants.[37] The issue presented by these cases requires that we assume —for purposes of giving effect to the Commission's actions during the period which must elapse pending disposition of the appeals by this Court—either that it has acted in accordance with the law and the authority conferred upon it or that it has not done so. If the actions are stayed it must be upon the assumption not only that error has been committed in law, but that its consequences will be ruinous to appellants within that period. We think the presumption is to the contrary and that, therefore, to issue stay orders because of such an assumption of error and resulting ruinous consequences, not only would constitute an unwarranted interference with the administrative process, but would ex-
[fol. 44] ceed the jurisdiction which Congress has conferred upon this Court.

The fact that as to actions of the Commission—other than those enumerated in Section 402(b) and which are excepted in Section 402(a)—Congress provided for judicial scrutiny with its attendant delay protected by stay procedure, indicates that appeals to the United States Court of Appeals were limited deliberately to situations in which expeditious administrative action was regarded by Congress as being required for the protection of the paramount public interest, even though that involves subordination of private interests to this purpose. Consequently, as to them, only a minimum of judicial correction was provided; solely upon questions of law, and limited to considerations of public interest. In other respects, as to such actions, the Commission and the public should enjoy the benefit of the presumption that its determinations are correct, and are in the public interest. This result would be defeated if persons who are permitted to show no more than a mere possible injury to the public were permitted to interrupt, indefinitely, the essential activities of this important administrative agency. Looking at the matter realistically, it is probable—as Congress apparently realized—that even in case of an erroneous decision, the Commission, working without judicial interference, would discover and correct

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[36] Perkins v. Lukens Steel Co., 310 U. S. 113, 130.

[37] Cf. Landis, The Administrative Process (1938) 30-34.

the error more quickly and thus better serve the public interest, than would be true under the slow process of stay orders and judicial scrutiny. "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."[38] The sections of the Communications Act previously referred to, which confer power upon the Commission to stay its own orders, upon a sufficient showing for that purpose, suggest the legislative intent in this respect.[39]

It is urged that to deny the power of the United States Court of Appeals to issue stay orders in these cases would make our decisions merely advisory. However, the Supreme Court has decided, concerning cases arising under Section 16 of the Radio Act, as amended in 1930:[40]

When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. * * * The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous.

Section 16 of the 1930 Act contains provisions for appeal similar to Section 402(b) of the Communications Act, so [fol. 15] the language of the Nelson Brothers case is equally applicable. Again in the Pottsville case the Supreme Court said: "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction."[41] These statements are entirely inconsistent with the theory that our decisions in such cases are merely advisory. It is true that our decisions are limited in their effect. When the United States Court of Appeals lays bare

[38] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 146.

[39] §§ 204, 312(a), 312(b), 405, 408, 416(b).

[40] Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 278.

[41] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 145.

the error of the Commission and compels obedience to its correction, it exhausts the only power which Congress gave it.[42] But even this is much more than a mere advisory opinion rendered in a vacuum and based upon no controversy.

As we pointed out in the Evans case,[43] there is no specific language in the statute which requires strict maintenance of the status quo pending disposition of such appeals as are here involved; the reasoning of the Pottsville case is equally applicable; and in view of the statutory provision for limited judicial review, the issuance of a stay order would have no other consequence than to delay the final determination of the controversy and thus to prevent the prompt and efficient disposition of the Commission's business, in direct contradiction of the administrative purposes of the statute. Moreover, this is true in spite of the fact that if the Commission's unstayed actions render the appeal moot we will be powerless to prevent it.[44] However, we have no reason to assume either the happening of the suggested contingency or that the time has come, in the life of this Commission "when hardship is so acute and general that the good of the device, submerged in the evil, is forgotten and invisible."[45] In any event, it is always possible for Congress to take proper corrective action, as the Commission is its agency, created by it and subject to its restraint.[46] It was Cardozo who "Conceiving the judicial function as dynamic" looked forward to "a more intimate channel of connection between legislatures and courts, bodies which move today in stately isolation."[47] For, indeed "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[48]

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[42] Ibid.

[43] Evans v. Federal Communications Commission, App. D. C. —, —, 113 F. (2d) 166, 169. See 29 Geo. L. J. 68, 70.

[44] Evans v. Federal Communications Commission, App. D. C. —, —, 113 F. (2d) 166, 170.

[45] Cardozo, The Paradoxes of Legal Science (1928) 69.

[46] Perkins v. Lukens Steel Co., 310 U. S. 113, 131.

[47] Cardozo, The Paradoxes of Legal Science (1928) 71, 64.

[48] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 146, quoting from Missouri, K. & T. Ry. v. May, 194 U. S. 267, 270.

Petitions denied.

[fol. 16] DISSENTING OPINION

STEPHENS, Associate Justice, dissenting.

I think the petitions for orders staying the action of the Communications Commission pending the determination of the appeals in these two cases should be granted.

For the purpose of a ruling upon the petitions the facts alleged therein, as well as those alleged in the petitions for appeal, are to be taken as true. These facts are set out in detail in the margin.[1] Stated in general and summary terms they are as follows: The petitioners are licensees operating radio stations. Without a hearing the Commission made orders granting applications to modify the facil-

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[1] No. 7699. Puget Sound Broadcasting Company v. Federal Communications Commission. The petitioner Puget Sound Broadcasting Company operates radio station KVI in Tacoma, Washington. The Queen City Broadcasting Company operates station KIRO in Seattle. Without a hearing, the Commission granted to the Queen City Broadcasting Company a permit to move its transmitter from downtown Seattle to a point about fifteen miles from Seattle and ten miles from Tacoma, and to increase its power from 1,000 to 10,000 watts and to use directional antennae. The effect of this grant is to add another station to the Tacoma listening area. The petitioner has been the outlet for Columbia Broadcasting System chain programs in Tacoma. Columbia has given notice to the petitioner that, as the result of the grant to the Queen City Company, the latter will be selected as Columbia's only outlet for Tacoma. Probable financial loss and possible economic disaster will be occasioned to the petitioner as a result. Not only did the Commission grant the permit to the Queen City Company without a hearing, it also denied petitioner's request for a "rehearing" and opportunity to present evidence to the Commission. The petitioner then appealed to this court and filed its petition for an order staying, pending the appeal, the action of the Commission in granting the permit to the Queen City Broadcasting Company. In its reasons for appeal, the petitioner charges: 1. The Commission erred as a matter of law in totally disregarding the effect that the granting of the KIRO application would have upon listeners in the area in question and the

ities of other existing stations in such manner as will, according to the assertions of the petitioners, adversely affect the [fol. 17] public interest in efficient radio service and also the private business of the petitioners. The petitioners requested a hearing of the Commission but the request was refused. They then appealed from the orders of the Commission—charging error of law in the denial of hearing. Unless orders are issued staying the orders of the Commission pending determination of the appeals, irreparable harm to the public interest and to the private business of

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ability of station KVI to continue its operation in the area in the public interest. 2. The Commission erred as a matter of law in failing to designate the application for hearing to determine how the listening public in the area would be affected by the duplication of chain program service. In its brief in support of the petition for a stay order, the petitioner also asserts that: "It is a definite and certain fact that local organizations and business men and the general listening public in the Tacoma area bitterly resent and object to the encroachment of Station KIRO in the Tacoma area and the termination of the Columbia Broadcasting System affiliation of Station KVI. The Appellant's station KVI, has over a long period of time devoted substantial amounts of program time without charge to civic, educational, and religious organizations located in the Tacoma area. The establishment of Station KIRO at a point near the city of Tacoma, resulting in a duplication to some extent of the service area of Station KVI, will result in a serious reduction in advertising revenue to Appellant's station. This reduction in turn must of necessity entail a discontinuance by Station KVI of many of its public service broadcasts to the damage and injury of the listening public."

No. 7657. Scripps-Howard Radio Company v. Federal Communications Commission. The petitioner Scripps-Howard Radio Company operates radio station WCPO in Cincinnati, Ohio, on a frequency of 1200 kc. at 250 watts power, unlimited time. Without a hearing and without notice to petitioner, the Commission granted a construction permit to station WCOL, Inc., licensee of WCOL, a local station at Columbus, Ohio, authorizing it to install the necessary equipment to change its frequency from 1210 to 1200 kc. and to increase its power from 100 to 250 watts,

the petitioners will as a result of the action of the Commission be occasioned. In short, the petitioners ask for stay orders to preserve the status quo—so that if upon determination of the appeals it is held that they had a right to be heard by the Commission, the conditions existing at the time the orders were made, i. e., before the orders became effective, will remain in being.

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unlimited time. The petitioner filed with the Commission an application for a "hearing or rehearing" and also a request that the grant to WCOL, Inc., be stayed pending the disposition of such application. The Commission denied the application for a "hearing or rehearing" and thus rendered effective the construction permit. At the same time the Commission granted to WHIZ, Zanesville, Ohio, a license to operate on 1210 kc., 250 watts, contingent, however, upon the change by WCOL, Inc., of its frequency from 1210 to 1200 kc. At the time that it made the orders referred to, the Commission in an opinion stated that although the change of frequencies would mean a loss of 20,800 listeners within the primary service area of the petitioner, it would result in an increase of 146,000 listeners within the interference areas of WCOL, Inc., WHIZ, and of a third station WLOK. The petitioner appealed from the order of the Commission denying its application for a "hearing or rehearing" and from the order of the Commission granting the permit to WCOL, Inc., and it also filed its petition for an order staying the Commission's action pending the appeal. In its reasons for appeal the petitioner alleged, in substance and effect, that: The Commission is not authorized to grant an application for a construction permit without a public hearing; the Commission is without power to reduce the petitioner's coverage and thus partially to revoke its license unless after public hearing it determined that such action was in the public interest—to do so would be a violation of the due process clause of the Fifth Amendment; at a hearing the petitioner would present evidence that the proposed change would not be in the public interest for the reason that a substantial portion of the listening public would as a result be deprived of the only local regional non-network service available, and evidence to the effect that the action to be taken is against the rules prescribed in the Commission's guidebook "Standards of Good Engineering Practice."

Three questions are presented: I. Has this court power, for the purpose of preserving the status quo, to stay orders of the Commission pending the hearing and determination of appeals from its orders. II. If the answer to question I is in the affirmative, are the petitioners within the class of persons named in the Communications Act as entitled to take an appeal from orders of the Commission. III. If the answer to question II is also in the affirmative, do the petitioners present upon the face of their petitions for appeal prima facie cases for the consideration of the court.

I

I think the court has power to stay orders of the Commission pending the hearing and determination of appeals from its orders. The Communications Act of 1934, 48 Stat. 1064, as amended by 50 Stat. 189, 47 U. S. C. A. §§ 151 et seq. (Supp. 1937), provides, in respect of appeals:

Sec. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals.

(1) By any applicant for a construction permit for a radio station license, or for renewal of an existing radio [fol. 18] station license, or *for modification of an existing radio station license*, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission *granting* or refusing *any such application.*

Sec. 402. (c) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and *in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. *The court's judgment shall be*

final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of Title 28, by appellant, by the Commission, or by any interested party intervening in the appeal. [Italics supplied]

The Judicial Code provides:

Sec. 262. * * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. [Act of March 3, 1911, 36 Stat. 1087, 1162, Rev. Stat. § 716, 28 U. S. C. A. § 377]

This section is applicable to the United States Court of Appeals: cf. Federal Trade Commission v. Klesner, 274 U. S. 145, 156 (1927); Claiborne-Annapolis Ferry Company v. United States, 285 U. S. 382 (1932); see also O'Donoghue v. United States, 289 U. S. 516, 551 (1933). The District of Columbia Code provides:

Sec. 230. Writs.—The said court of appeals[2] shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction. [Act of March 3, 1901, 31 Stat. 1189, 1227, D. C. Code (1929) tit. 18, § 33].

Apart from such statutes, appellate courts have inherent power to protect their jurisdiction by appropriate orders. To preserve the status quo temporary injunctions may be issued: Ohio Oil Co. v. Conway, 279 U. S. 813, 815 (1929); Love v. Atchison, Topeka & Santa Fe Railway Co., 185 Fed. 321, 331-2 (C. C. A. 8th, 1911); City of Council Bluffs v. Omaha & Council Bluffs Street Railway Co., 9 F. (2d) 246, 247 (C. C. A. 8th, 1925); or writs of supersedeas: In re Claasen, 140 U. S. 200, 207-8 (1891); In re McKenzie, 180 U. S. 536, 551 (1901); or stay orders: Beaumont, Sour Lake & Western Railway Co. v. United States, 282 U. S. 74, 92 (1930). In respect of temporary injunctions Judge

[2] By Act of June 7, 1934, 48 Stat. 926, Congress enacted that the court of appeals shall "hereafter be known as the United States Court of Appeals for the District of Columbia."

Walter H. Sanborn said in Love v. Atchison, Topeka & Santa Fe Railway Co., supra:

"The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. It is a familiar rule of equity jurisprudence that if the questions presented in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irre- [fol. 19] parable if the motion for the interlocutory injunction is denied and the final decision is in his favor, while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may be indemnified by a bond, the injunction usually should be granted. * * *" (185 Fed. at 331-2) Similar language was used again by Judge Sanborn in City of Council Bluffs v. Omaha & Council Bluffs Street Railway Co., supra. Love v. Atchison, Topeka & Santa Fe Railway Co., supra, was cited by the Supreme Court, and Judge Sanborn's language referred to, in Ohio Oil Co. v. Conway, supra.

Stay orders are within the quoted language of the Judicial and District of Columbia Codes. They are writs not specifically provided for by statute; they are necessary to the exercise of appellate jurisdiction; they are agreeable to the usages and principles of law; they are necessary and proper remedial prerogative writs in aid of appellate jurisdiction. If they cannot be issued so as to preserve the status quo pending an appeal, the appellate power is without useful effect.

I think that Section 262 of the Judicial Code clearly evidences an intention by Congress that all of the Federal courts of appeals, including this court, shall have full power to make their appellate jurisdiction effective; and I think that Section 230 of the District of Columbia Code with equal clarity evidences the same intention in respect of this Court specifically. And I think that the quoted portion of the Communications Act clearly evidences the intention of Congress to make the appellate jurisdiction of the United States Court of Appeals over orders of the Communications Commission effective. Why otherwise did the

Congress use the language which I have italicized above empowering the court, in the event it reverses a decision of the Commission, to remand the case to the Commission "to carry out the judgment of the court," and the language "the court's judgment shall be final. * * *"? How can the judgment of the court be carried out and be final if, before the judgment has been rendered, an order of the Commission held erroneous has already been carried irreparably into effect?

In view of all of the statutory provisions above quoted, including the provision of the Federal Code that the circuit courts of appeals shall have power to issue all writs "not specifically provided for by statute," I cannot think that the mere absence in the Communications Act of language expressly authorizing the issuance of stay orders is conclusive of an absence of power in the court to issue them. I cannot conclude, as do the majority, that the making applicable, by Section 402(a) of the Communications Act, to suits to enforce, enjoin, set aside, amend or suspend orders of the Commission other than those made the subject of appeal in Section 402(b), of the provisions of the Urgent Deficiencies Act (Act of October 22, 1913, 38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, has the effect, merely because it thus by reference incorporates the stay order provisions of the Urgent Deficiencies Act, to exclude power to issue stay orders in appeals taken under Section 402(b). The only basis for such a conclusion is the doctrine expressio unius est exclusio alterius. This maxim is to be applied only as a means of discovering legislative intent, and is not to be permitted to defeat a plainly indicated purpose of the legislature. Springer v. Philippine Islands, 277 U. S. 189, 206 (1928); 25 R. C. L. 983; 59 C. J. 984-5. I think that the intention of Congress to confer an effective appellate jurisdiction upon this court is so [fol. 20] clearly evidenced in the statutes above quoted that the maxim is not applicable.

If I am correct in saying that the intention of Congress has been clearly evidenced, then recourse to legislative history is neither necessary nor permissible. In any event, I think the legislative history referred to by the majority is equivocal. It as much evidences a belief by Congress that no further legislation than that above set forth was neces-

sary to give the court power to issue stay orders as it evidences a contrary belief.

II

The facts stated at the outset of this dissenting opinion make clear that the petitioners are within the class of persons named in the Communications Act as entitled to appeal. Each of them is, strictly within the language of Section 402(b)(2) of the Act, a "person aggrieved or whose interests are adversely affected by any decision of the Commission granting * * * any such application," i. e., such as is referred to in Section 402(b)(1), to wit, in these cases, an application "for modification of an existing radio station license." But not only is the standing of the petitioners to appeal thus within the language of the Act, also it is confirmed by the ruling of the Supreme Court in Commission v. Sanders Radio Station, 309 U. S. 470 (1940). In that case the respondent Sanders Radio Station appealed from an order of the Commission granting a construction permit to another station which would compete within the respondent's area in a manner which would, so the respondent contended, decrease its private revenues and impair its efficiency to serve the public interest, convenience and need. While the Supreme Court held, as I later point out in more detail in another connection, that economic injury to an existing station through the granting of station rights to a competitor is not in and of itself, apart from considerations of public interest, convenience and necessity, an element which the Commission must weigh in determining whether or not to grant rights to the competitor, the Court nevertheless also held that it did not follow that, because the licensee of an existing station could not successfully resist the granting of a license to another upon the mere ground that the resulting competition might work economic injury to the existing station, such licensee had no standing to appeal from an order of the Commission granting the competitor's application. On the contrary, the Court expressly pointed out that:

Congress had some purpose in enacting § 402 (b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commis-

sion in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal. [309 U. S. at 477]

The Supreme Court held therefore:

> • • • that the respondent had the requisite standing to appeal and to raise, in the court below [the United States Court of Appeals], any relevant question of law in respect of the order of the Commission. [ibid.]

I think Perkins v. Lukens Steel Co., 310 U. S. 113 (1940), relied upon by the majority, distinguishable. That case held that the remedy to correct an alleged misconstruction of the Public Contracts Act by the Secretary of Labor [fol. 21] was through legislation or executive action, not through the suit of the respondent bidders for public contracts. The Supreme Court expressed the view that no legal rights of the respondents were shown to have been invaded or threatened. The Court said:

> • • • neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. • • • Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to *a particular right of their own*, as distinguished from the public's interest in the administration of the law • • • [110 U. S. at 125] [Italics supplied].

But the Sanders case, as I have just pointed out, expressly recognizes that persons in the position of the respondent in that case and of the petitioners in the instant cases have been selected by Congress—because likely to be financially injured by the Commission's action in respect of the licenses of others and because likely, therefore, to have a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission—to take appeals under Section 402(b) (2) of the Communications Act to vindicate the public interest. Moreover, I think the petitioners in the instant case do have particular rights of

their own which are the proper subject of a hearing before the Commission and t[illegible]fore of judicial consideration on appeal. I discuss this below in another connection. The Lukens case is further distinguishable for the reason that the Supreme Court predicated its decision therein upon the further propostion that the courts are without power to interfere with the internal affairs—the purchasing activities and machinery—of the Government. And the Court took pains to point out that it was such affairs that were the subject of the Public Contracts Act and that "The Act does not represent an exercise by Congress of regulatory power over private business or employment." But under the Communications Act the Commission is not an agency engaged in the dispatch of the internal affairs of the Government; its functions under the regulatory power of the Government over interstate commerce in radio communications. Radio Commission v. Nelson Bros. Co., 289 U. S. 266 (1933); F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134 (1940); Commission v. Sanders Radio Station, supra.

In my opinion L. Singer & Sons v. Union Pacific Railroad Company, decided December 16, 1940, by the Supreme Court (9 U. S. Law Week, No. 25, Sec. 4, p. 4089; U. S. Sup. Ct. Service (C. C. H., Oct. Term 1940) op. vol. 333) and relied upon by the majority, is also distinguishable. In that case the petitioners, L. Singer & Sons and Kansas City, Missouri, undertaking to proceed under paragraphs 18, 20, and 21, Section 402, Transportation Act 1920 (41 Stat. 456, 477, 49 U. S. C. § 1), sought a decree in a United States District Court enjoining the respondent Railroad Company from constructing or operating an alleged extension of its tracks. Paragraphs 18 and 20 of the Transportation Act provide:

(18) * * * no carrier by railroad subject to this Act shall undertake the extension of its line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction * * * of such * * * extended line. * * *

[fol. 22] (20) * * * Any construction * * * contrary to the provisions * * * of paragraph (18) * * * may be enjoined by any court of competent jurisdiction at the

suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest. • • •

The railroad extension involved was to be a proposed produce market in Kansas City, Kansas. L. Singer & Sons were engaged in the business of buying and selling at wholesale and retail fruits, vegetables and other products within and adjacent to a so-called capital city market of Kansas City, Missouri, and L. Singer & Sons and Kansas City, Missouri, itself asserted that the construction or operation of the extension "will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest." The sole question in the case was whether or not the petitioners had a right to sue as "parties in interest" within the language of paragraph 20 above quoted. The decision, by a divided court, was in the negative. The case is distinguishable from the instant cases in three respects: First, the phrase "any party in interest" which was the subject of construction in that case is of much narrower ambit than Section 402(b) (2) of the Communications Act giving a right of appeal to "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting • • • any such application" (as is referred to in Section 402(b) (1)). Second, the theory of decision in the Singer case is evidenced by the following quotation therefrom:

• • • Such a suit cannot be instituted by an individual unless he "possesses something more than a common concern for obedience to law." The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See Detroit & M. Ry. v. Browne City, etc., & Co., 286 Fed. 540. If such circumstances are shown he may sue; he is then "party in interest" within the meaning of the statute. In the absence of these circumstances he is not such a party.

We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injunction against a carrier seeking only to serve a competing market by means of an extension not authorized by the Interstate Commerce Commission.

But the recognition, just alluded to, in the Sanders case that persons in the position of the respondent there and of the petitioners here have been selected by Congress to take appeals makes the theory of decision of the Singer case inapplicable to the petitioners in the instant cases. Third, in the Singer case, the suit was for a permanent injunction, at least until by regular action of the Commission a certificate of convenience and necessity for the extension had been issued. In the instant cases the application is for a stay order pendente lite only.

III

If stay orders are to be issued, the petitioners must of course have made a prima facie showing that the Commission has erred. That is to say, if upon the face of the petitioners' allegations upon appeal there is no probability that the court would hold in the appeal that the Commission [fol. 23] had erred in the orders complained of, or in the manner of arriving at them, then the court, under elementary principles of judicial practice, would not be warranted in staying the Commission's orders pending appeal. But I think that such a prima facie case has been stated by the petitioners.

The error charged is the Commission's granting, *without a hearing to the petitioners*, such modification—extension—of the facilities of competitor stations as will adversely affect both the public interest and the private business of the petitioners. The Commission contends that such an allegation of error constitutes no prima facie showing. So far as alleged injury to the public interest is concerned, says the Commission, it has been given by Congress the duty of protecting the public interest and it is not to be presumed that it committed error even by denying the petitioners a hearing. And so far as the alleged injury to the private business of the appellants is concerned, the Commission

tells us that the petitioners have no private rights in respect of injury to which they are entitled to any hearing. In No. 7699, Puget Sound Broadcasting Company v. Federal Communications Commission, the Commission says:

The only right which can be spelled out of appellant's Petition for Stay or Notice of Appeal and Reasons for Appeal is the right to be protected from loss of its network affiliation and advertising revenues because of the proposed competition of another station. The Supreme Court's holding in the Sanders case establishes that no such right exists.

In No. 7657, Scripps-Howard Radio, Inc. v. Federal Communications Commission, the Commission states:

Appellant's claim to relief * * * is based upon a claim of threatened loss of a portion of appellant's service area. Such loss, however, does not constitute an invasion of any right of appellant and hence does not constitute a legal injury.

In respect of injury to the public interest. The proposition of the Commission that since it has been charged with the duty of protecting the public interest, it is not to be presumed that it can have committed error, is, in my opinion, refuted by Commission v. Sanders Radio Station. The premise underlying the recognition by the Supreme Court in the Sanders case that one in the position of the respondent there, the petitioners here, has the requisite standing to appeal and to raise in the United States Court of Appeals any relevant question of law in respect of the order of the Commission, and underlying the reference by the Supreme Court to such an appellant as a person having a sufficient interest to bring to the attention of the appellate court "errors of law in the action of the Commission in granting the [competitor's] license," is to the contrary of the proposition that the Commission cannot, either absolutely or presumptively, err in its rulings in respect of the public interest. If the Commission can do no wrong, why permit an appeal? It is clear from a reading of the Sanders case that the errors of law which the Court had primarily in mind were errors of law in respect of the action of the Commission in the public interest.

The Sanders case is, I think, also necessarily contrary to the contention of the Commission that it need grant the petitioners no hearing on the question whether proposed

action of the Commission will be in the public interest. It [fol. 24] follows from the fact that the respondent in the Sanders case and the petitioners here are persons intended by Congress "to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license," that such persons must be given hearings before the Commission in the course of which they may urge what would be a proper ruling by the Commission in the public interest. How otherwise could they give the Commission the benefit of their factual and legal contentions in vindication of the public interest? Moreover, the United States Court of Appeals is a court of review, not of first instance. It cannot for the first time consider evidence or arguments in respect of the duty of the Commission concerning the public interest. Therefore the petitioners, in order to protect the public interest upon appeal, must first have had an opportunity, in a hearing before the Commission itself, to present their evidence and their arguments in the public interest.

In respect of injury to the private right of the petitioners. The contention of the Commission that there is no private right in the petitioners which may be the subject of vindication in a hearing before the Commission is, I think, refuted by the terms and clear implications of the Communications Act itself—which recognize the existence of private rights in station licenses and which contemplate hearings in respect of their impairment or destruction; and the Commission's contention is in my opinion refuted also by the reasoning of the Supreme Court in F. C. C. v. Pottsville Broadcasting Co., and Radio Commission v. Nelson Bros. Co.; and I think the Commission's contention is given no support in the Sanders case, as I read that case.

The provisions of the Act to which I refer as recognizing a private right in station licensees, and as contemplating hearings in respect of such rights, are the following:

Sec. 301. It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, *beyond the terms, conditions, and periods of the license.* . . . (Italics supplied.)

Sec. 303.(f) * * * changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, *after a public hearing*, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with; * * * (Italics supplied.)

Sec. 303. (m) (2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days *for a hearing* upon such order * * * Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of *the hearing* which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension. (Italics supplied.)

Sec. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years * * * and any license granted may be revoked as hereinafter provided. * * *

Sec. 309. (b) (1) The station license shall not vest in the licensee any right to operate the station nor any right in [fol. 25] the use of the frequencies designated in the license *beyond the term thereof* nor in any other manner than authorized therein. (Italics supplied.)

Sec. 309. (b) (2) Niether the license nor *the right granted thereunder* shall be assigned or otherwise transferred in violation of this chapter. (Italics supplied.)

Sec. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failing to operate substantially as set forth in the license, or for violation of or failure to observe any

of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a *hearing* upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the *hearing* conducted under such rules as the Commission may prescribe. Upon the conclusion of said *hearing* the Commission may affirm, modify, or revoke said order of revocation. (Italics supplied.)

Sec. 312. (b) Any station license after June 19, 1934, granted under the provisions of this chapter or the construction permit required hereby and after such date issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given *reasonable opportunity to show cause* why such an order of modification should not issue. (Italics supplied.)

Sec. 319. (b) * * * The *rights* under any such (construction) permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. * * * (Italics supplied.)

I am aware that the provisions in the Act for hearings speak in terms of licenses and rights which are undergoing alteration, suspension or revocation through direct action of the Commission thereon, and not in terms of the rights of existing licensees—such as those of the petitioners—which will be impaired by the direct action of the Commission granting or extending facilities to competitors. But I think that by clear implication the safeguards of the Act operate for the benefit of such licensees as the petitioners

also. For it cannot be doubted that the modification—in the instant cases the extension—of one license right may have the consequence, through competition, of impairing, or even of destroying, the business of an existing licensee; this in practical effect is a modification or revocation of his license. A contrary view would regard form rather than substance. That the granting of new or additional station rights may through competition have the consequence of impairing or destroying the business of an existing licensee is recognized in the Sanders case where the Supreme Court, after stating that it is not the purpose of the Act to protect a licensee against competition but to protect the public, states also:

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately [fol. 26] to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. * * * (309 U. S. at 475-6.)

I think the true answer to the question what rights, if any, licensees under the Communications Act have, and to the question what legal protection such rights are entitled to, lies between the extreme position taken by the respondent and repudiated by the Supreme Court in the Sanders case, on the one hand, and the extreme position taken by the Commission in the instant cases on the other. The respondent in the Sanders case contended that its right under an existing station license was of such character as to make economic injury to that right a separate and independent element to be taken into consideration by the Commission in determining whether or not it should grant or withhold a license for a competing station. The position of the Commission in the instant cases is that the petitioners as station licensees have under the Act no rights at all which must be the subject of hearing and consideration by the Commission in determining whether it shall grant or withhold modifications of other licenses, with resultant competitive injury

to the petitioner licensees. In respect of the nature of the rights of a station licensee, the truth between these two extremes is, I think, that a station licensee has under the Act rights which, although not unlimited or indefeasible—they are limited in time and quality by the terms of the licenses under which they are granted and they are subject to suspension, modification or revocation in the public interest, and this either by act of the Commission directly affecting them or by competition resulting from direct action of the Commission in respect of competing licenses—are nevertheless rights recognized in the law as such. And in respect of the character of legal protection to which such rights are entitled, I think the truth between the two extremes is that these rights, limited though they are, nevertheless are rights which are not to be modified, suspended or revoked, either directly or through modification of the licenses of others, without a hearing on the question whether the public interest will be served by such modification, suspension or revocation.

Broad analogies to such rights are seen in license rights to practice the learned professions and to carry on a business. License rights to practice the learned professions are subject to the public interest that they be exercised only by persons of fit character and capacity, but they are not revoked without a hearing upon the question whether the licensee has ceased to be a person of fit character and capacity and whether, therefore, the public interest requires their revocation. And for comparison with the rights of the petitioners in the instant cases the analogies do not fail—as it may be suggested—because the holder of a license to practice a learned profession is not accorded a hearing upon the question whether a license shall be issued to others who may thereby become professional competitors. True, the holder of a right to practice a learned profession cannot insist upon a hearing upon the question whether a license shall be granted someone else to practice that profession generally; but licenses to practice the learned professions are not granted in respect of particularized facilities as are [fol. 27] broadcasting licenses which fix frequency, power and time. To the effect that there must be a hearing before disbarment of a lawyer see Ex parte Robinson, 86 U. S. 505 (1873); Garfield v. U. S. ex Rel. Spalding, 32 App. D. C. 153 (1908). And to the effect that there must be a hearing before revocation of a license to carry on a business

see Northern Cedar Co. v. French, 131 Wash. 394, 230 Pac. 837 (1924). In that case the Commission Merchants Regulation Act of Washington (Session Laws, 1923, p. 366, c. 134, Rem. Comp. Stat. (1923 Supp.) p. 481, § 8299), which required every commission merchant, as a condition precedent to engaging in his business, to procure a license from the state director of licenses, imposed upon such merchants the duty of rendering to the consignor within five days following a sale of agricultural products on commission a true statement concerning the sale, and the duty within ten days of paying to the consignor all sums due. The Act further provided (Section 8):

Whenever any consignor shall, after request, receive no remittance or report of sale, or if after receipt of any report or remittance be dissatisfied with such report or the amount of such remittance, he may make a verified complaint in writing to the director of agriculture who shall upon receipt of the same cause to be investigated the sale or sales complained of, and if upon such investigation it appears that the said commission merchant has failed or neglected to account for such consignment or any part thereof, or has failed or neglected to make a true and complete report thereof, *it shall be the duty of the director of licenses upon recommendation of the director of agriculture to revoke the license of such commission merchant;* and thereafter such commission merchant shall not be entitled to any license until the director of agriculture shall approve the issuance of a license to such person. (Italics supplied.)

In an action brought by merchandisers of timber products and of fruit and fruit products to enjoin enforcement of the Act as unconstitutional, it was held that Section 8 was void as permitting the state director of agriculture to revoke a merchant's license without an opportunity to be heard. The court said:

The spirit of our laws and institutions demands that a citizen be not deprived of his property or rights without notice. This act does not even intimate that before annulling a license the director of agriculture must give the holder a right to be heard. Under it, the director may make a secret investigation and revoke the license before the holder thereof has any intimation that anything is being done with reference thereto. Manifestly the license is a

thing of great value to the commission merchant, for under this law he may not prosecute his business at all without it. If it is revoked, his business is destroyed, and yet no revocation.

The state contends that the license is nothing more than a privilege, and may be revoked at any time without notice. It is not a license of that character. It may not be revoked arbitrarily as a matter of right and without cause. We are cited to State ex rel. Nowotny v. Milwaukee, 140 Wis. 38, 121 N. W. 658, 133 Am. St. Rep. 1060, as holding that a board of health which is given power to issue a license may revoke it without notice if the act is not arbitrary. If this case so holds, we cannot concur with it.

It is also argued that the license is not property, and therefore may be revoked without notice, and that the case of People ex rel. Lodes v. Department of Public Health of City of New York, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894, so holds. The act in question there provided that no milk should be offered for sale or delivery in the city without a written permit from the board of health, and that such permit was not property under the constitutional provision, but was merely a license, revocable by the board without notice to the holder. Manifestly, that case is not [fol. 28] controlling here. That was nothing more than a permit which apparently authorized the distribution of milk until it was revoked; but the license in this case authorizes the transaction of business for a definite period, and is not only property but very valuable property.

It is further argued by the state that the requirement of notice applies only to judicial proceedings and not to those before administrative officers. We can see no reason for such a distinction. As much damage may be done to the holder of the license by an administrative officer annulling it as by its annulment through an order of the court. In State ex rel. Baldwin v. Moore, 7 Wash. 173, 34 P. 461, speaking of this subject, we said:

"The constitutional provision declaring that no person shall be deprived of life, liberty, or property without due process of law, is not limited to judicial proceedings, but extends to every proceeding which may interfere with those rights, whether judicial, administrative, or executive." (131 Wash. at 409, 230 Pac. at 843.)

It is obvious that a station license issued under the Communications Act for a definite term for the conduct of a

broadcasting business requiring substantial investment is more than a mere privilege or gratuity. Whether or not it may be technically called a property right, it is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. To the effect that the courts extend protection against illegal injury by a public authority to rights limited by the public interest and revocable, see Red Canyon Sheep Co. v. Ickes, 69 App. D. C. 27, 98 F. (2d) 308 (1938), concerning licenses to graze upon the public domain. On the subject of hearing before revocation of licenses see Gelhorn, Administrative Law—Cases and Comments (1940), 372-382 inclusive.[3]

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[3] The following statements by the editor, although derisive of the efforts of courts to resolve the conflict between public interest and private right in respect of license revocations, are nevertheless pertinent and helpful as illustrating the distinction between mere privileges or gratuities which may be withdrawn or cut down without an opportunity to be heard and rights which, although of a limited nature, may not be taken away without a hearing.

"Two considerations have competed for supremacy in connection with the problem of license revocation. First there is the need of immediate public protection against continued activity under a license, when the licensee has misused his power. Against this is the fear that a speedy revocation of the license may result in catastrophe to the licensee; ill-advised administrative action may destroy his reputation or his investment without his having had an opportunity to present the facts upon which administrative action should depend. The attempted resolution of these conflicting considerations has, unfortunately, been marked by a particularly arid and unhelpful conceptualism. In the opinion of the editor, the basic force of neither consideration has been sufficiently served by present decisions or by the administrative methods that have ordinarily followed in their train.

"The prevalent judicial sentiment has been that when a license confers merely a privilege upon its holder, the privilege may be withdrawn without notice and without an opportunity to be heard (and, indeed, without any reason whatsoever, if the legislature chooses to demand none). Since a bare privilege may be withdrawn without the same process of law that is deemed to be 'due' when property in-

[fol. 29] Even if the Communications Act were doubtful in its recognition of the existence of rights in licensees and in its provision for hearings upon the question whether the public interest requires the reduction or destruction of such rights, I think it would be the duty of the court to construe the Act as recognizing such rights and providing for such hearings—and this for two reasons. First, in the absence of indubitably clear language requiring such a conclusion, it would be unthinkable to conclude that the Congress would provide for the granting of station licenses for radio broadcasting contemplating, in connection with operating a station, investment in building space and equipment, the hiring of talent, the contracting for advertising, and the employment of labor, but at the same time fail to recognize that by

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terests are at stake, the licensing officials may be given practically limitless authority to revoke permits of this character.

"On the other hand, of course, some licenses are regarded by the courts as conferring something much more valuable than a mere privilege terminable at will; rather, they vest in the licensee a property right which may not be taken away from him without prior notice and an opportunity for hearing.

"The assignment of licensed occupations or activities to the 'privilege' or the 'property' category, as the case may be, is, as might be expected, based very largely upon judicial conceptions of the desirability of the activity in question. And the appraisal of desirability is influenced, again to a very substantial degree, by the amount of investment the licensee has made in his business, though naturally the weight attached to this factor is not frankly stated in every opinion.

"Thus, for example, one finds that dance halls, pool rooms, dram shops and the like, which are not traditionally regarded as 'respectable,' may be maintained only by virtue of the gracious permission of the community, and that the 'privilege' to continue the maintenance of such a business is one surrounded by few legal protections.

"On the other hand, businesses that might also be regarded as not contributing largely to the flowering of the community seem to become, in the eyes of the courts, of a character beyond the reach of whimsical licensing officials if they involve a considerable investment."

whatever technical name they might be called, whether property rights or license rights, interests would arise, in the persons to whom licenses were granted, which should as a matter of fair play not be impaired or destroyed by the Communications Commission without a hearing upon the question whether the public interest would be served by their impairment or destruction. Right to a hearing before injury by the government in the public interest is one of the fundamental decencies guaranteed by democratic institutions. It is the safeguard of the Anglo-American legal system against arbitrary or capricious action by public authorities. No purpose should be attributed to Congress to deny such a right. Second, to construe doubtful language of Congress as permitting the impairment or destruction of such interests without a hearing would be to invalidate its action under the due process clause of the Fifth Amendment. That that clause protects against the arbitrary impairment or destruction of substantial rights even though they are limited by the public interest, is not open to doubt. Cf. Northern Cedar Co. v. French, supra.

I think the position which I take in respect of the existence of limited rights in a station licensee and in respect of right to a hearing upon the question whether the public interest will be served by the reduction or destruction of such rights by the modification of the facilities of another licensee is confirmed in F. C. C. v. Pottsville Broadcasting Co., supra. In that case the Pottsville Broadcasting Company was an applicant for a permit for the construction of a broadcasting station in Pottsville, Pennsylvania. After a hearing the Commission denied the application upon the ground that the Company was financially disqualified. The Company appealed to this Court. We found the Commission's conclusion regarding the Company's financial disqualification to have been based upon an erroneous concep-
[fol. 30] tion of Pennsylvania law, and we therefore reversed the decision and remanded the case to the Commission for reconsideration in accordance with the views we expressed. Following this remand the Company petitioned the Commission to grant its application. Instead, the Commission set the same for argument along with two rival applications, for the same facilities, which had been filed subsequent to that of the Pottsville Company. Hearings had been held by the Commission on these applications in a consolidated proceeding, but they were undisposed of when the Pottsville

Company case was returned to the Commission. The Commission directed that all three of the applications be set for argument to determine which would, on a comparative basis, in the judgment of the Commission best serve the public interest. The Pottsville Company then applied to this Court for and obtained a writ of mandamus commanding the Commission to set aside its order designating the Pottsville application for hearing on a comparative basis with the other two, and directing it to hear and reconsider the application of the Pottsville Company upon the basis of the record as originally made and in accordance with our opinion in the original appeal and in the mandamus proceeding. Our view was that since under the terms of Section 402 (c) of the Act, set forth in topic I above, this Court is to hear and determine appeals from the Commission upon the record before the court and has power upon such record to enter a judgment affirming or reversing the decision of the Commission and in the event of reversal to remand the case to the Commission to carry out the judgment of the Court, as final, and since, except for the error of law by the Commission in respect of the financial disqualification of the Pottsville Company, a license for a definite term would have been issued by the Commission to that Company, it was the duty of the Commission to accord priority to that Company by issuing a license to it.[4]

The Supreme Court took a different view. In reversing this Court it said: "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority." And the Court held that in its first disposition the Commission had committed a legal error did not create rights of priority in the Pottsville Company as against the later applicants which it did not otherwise possess through Congressional action.

The Pottsville case had to do, however, it is thus made apparent, with the question of priority—that is prior right among several applicants to receive a construction permit. And the case thus obviously dealt not with licensees and

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[4] Pottsville Broadcasting Co. v. Federal Communications Commission, 70 App. D. C. 157, 105 F. (2d) 36 (1939).

their rights, but with the interests of those who were seeking to be licensees. I therefore do not understand the decision at all to deny the existence, in those to whom licenses have been issued, of rights which are the proper subject of legal protection. On the contrary the language of the opinion of the Supreme Court at various points indicates, I think, recognition of the existence of a right in a licensee during the existence of the license. Thus, the opinion states (p. 137), referring to Section 307 (d) of the statute: "No [fol. 31] license was to be 'construed to create any right, beyond the terms, conditions, and periods of the license.'"

Again (p. 138): "Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest." Again, the opinion (p. 138) says: "Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years * * *" —thus recognizing the existence of an investment and of a license term. Again (p. 138) the Court says: "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." This at least impliedly recognizes that the Act dealt with private rights secondarily. Still further (p. 144) in defining the powers of the United States Court of Appeals in reviewing the Commission's orders, the Supreme Court said that the court of appeals "was restricted to a purely judicial review. 'Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision.'" The quotation was from Radio Commission v. Nelson Bros.

Co., supra, at page 276. And it is to be noted, finally, that the opinion of the Supreme Court in the Pottsville case states (p. 143): "To be sure, the laws under which these (administrative) agencies operate prescribe the fundamentals of *fair play*. They require that interested parties be afforded *an opportunity for hearing* and that *judgment must express a reasoned conclusion*. * * *" (Italics supplied.) These references to due process and the fundamentals of fair play and the opportunity for hearing and the necessity for a reasoned conclusion impliedly recognize the existence of a private right in licensees. The due process clause of the Fifth Amendment is phrased in terms of the property—as well as of the life and liberty—of persons. And these references to due process further recognize, I think, a right to a hearing before the private rights may be impaired or divested even in the public interest—a hearing, that is, upon the question whether the public interest will be served by the impairment or divesting of such rights.

I am aware that under the Sanders case the interest of an existing licensee against injury by competition cannot as such be successfully insisted upon. It must give way to the public interest, convenience and necessity. But I see nothing in the Sanders case which requires a ruling that there are no rights even of a limited nature, in a licensee, or that he is not entitled to a hearing upon the question whether the public interest requires the impairment or de- [fol. 32] struction of such rights through the extension or modification of the facilities of existing licensees.

In the Sanders case the Telegraph Herald, a newspaper published in Dubuque, Iowa, filed an application for a construction permit to erect a broadcasting station in that city. The Sanders Radio Station which already held a broadcasting license for and had operated a station at East Dubuque, Illinois, directly across the Mississippi River from Dubuque, Iowa, applied for a permit to remove its transmitter and station to Dubuque, and for leave to intervene in the Telegraph Herald proceeding. It alleged that there was an insufficiency of advertising revenue and talent for an additional station in Dubuque; that it was already rendering adequate service to Dubuque through its station in East Dubuque, so that there was no need for an additional radio outlet in Dubuque; that the granting of the Telegraph Herald's application would not serve the public interest, convenience and necessity. Intervention was per-

mitted, and a hearing was held. A showing was made by the Sanders station that it had operated at a loss, that the area proposed to be served by the Telegraph Herald was substantially the same as that served by the Sanders station itself, and that more than half of the advertisers relied on to support the Telegraph Herald station had used the Sanders station for advertising. The broadcasting division of the Commission granted both applications, reciting in its order that public interest, convenience and necessity would be served by such action. It found both applicants legally, technically and financially qualified, and found that there would be no electrical interference. In an appeal taken to this court by the Sanders station, we held that one of the issues which the Commission should have tried, and upon which it ought to have made findings, was that of alleged economic injury to the Sanders station by the establishment of the Telegraph Herald station; and we set aside the action of the Commission in granting the Telegraph Herald permit without a finding upon such issue.[5] The Supreme Court reversed. It held that "resulting economic injury to a rival station is not, *in and of itself, and apart from considerations of public convenience, interest, or necessity*, an element the petitioner must weigh; and as to which it must make findings, in passing on an application for a broadcasting license." (Italics supplied) It said in similar terms "economic injury to an existing station is not *a separate and independent element* to be taken into consideration by the Commission in determining whether it shall grant or withhold a license." (Italics supplied).[6] The reasoning [fol. 33] of the Supreme Court in the Sanders case was that the Communications Act recognizes that broadcasters are not common carriers and that the field of broadcasting is

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[5] Sanders Bros. Radio Station v. Federal Communications Commission, 70 App. D. C. 297, 106 F. (2d) 321 (1939).

[6] This point of view was expressed in Tri-State Broadcasting Co. v. Federal Communications Commission, 71 App. D. C. 157, 158-9, 107 F. (2d) 956, 957 (1939), in an opinion for the court by Vinson, Associate Justice. The opinion said: "The owner of an existing station may well contend in any case that a new station may reduce the present income of his station, but it requires more to justify the Commission refusing to grant the new license. A mere showing that the income of an existing station may be reduced if

one of free competition open to anyone if there is an available frequency. It is true that the Court said also:

> The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.
>
> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his program attractive to the public. [309 U. S. at 475]

But the Court nevertheless said still further:

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. [id. at 475-6]

And then the Court said:

> • • • These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a

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another station enters its field is not sufficient. The appellant recognizes that such can not be the criterion of economic injury herein, as it charges that the competition complained of will be destructive and ruinous. The character of competition may affect the public interest, convenience and necessity, which is the statutory criterion under which the Commission must act. • • •"

valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives, which Congress would not have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.

We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license. [id. at 476]

The Sanders case was decided by the Supreme Court but a few weeks later than the Pottsville case. While it does not refer to the same, it is not I think to be taken in any manner to overrule or modify that case or Radio Commission v. Nelson Bros. Co. which was referred to in the Pottsville case. The Sanders case leaves standing therefore the recognition in the Pottsville case of the existence of private rights in licensees, of rights to a hearing in respect of the same, of a duty of fair play by the Commission, of the guarantee of the due process clause. It leaves standing also the Nelson Bros. case wherein the Supreme Court said (at page 285):

In granting licenses the Commission is required to act "as public convenience, interest or necessity requires." This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare N. Y. Central Securities Co. v. United States, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. In making such an adjustment *the equities of existing stations undoubtedly demand consideration.* * * * [Italics supplied]

[fol. 34] The statement in the Sanders case that the policy of the Act is clearly that no person is to have "anything in the nature of a property right as the result of the granting of a license" must be read in connection with the opinion as a whole, and in connection with the utterances of the Court in the Pottsville and Nelson Bros. cases. Moreover notwithstanding this statement in the Sanders case, the

opinion therein recognized that the Sanders Company and persons in its position might be "financially injured by the issue of a license." This implies the existence of some right to be injured. Also, in the Sanders case the Court was occupied not with the question as to what right, if any, existed in a station licensee, but with the question whether the rights or interests of a station licensee, whatever they were, or by whatever name called, were such that economic injury to them must be taken into consideration by the Commission as a separate and independent element—irrespective of the public interest—in determining whether or not it should grant or withhold a license to another. I think therefore that the Supreme Court in the Sanders case in its reference to the absence of "anything in the nature of a property right as the result of the granting of a license," is using the term property right in the sense of a right absolute or indefeasible. I do not think the decision was intended to be taken as meaning that no right even of a nature limited by the public interest exists in a licensee. Neither do I think that the decision was intended to mean that an existing broadcasting station and the investment therein may be injured or destroyed by the introduction of competition through a new licensee or through the extension or modification of the facilities of other existing licensees without a hearing before the Commission on the question whether the public interest, convenience and need will be served by such injury or destruction.

Certainly the opinion in the Sanders case does not purport to write out of the statute the many provisions above quoted which recognize the existence of some right in a licensee while the license subsists, and which recognize the right to a hearing before a license is altered, suspended or revoked, directly, or, as I think, indirectly. I think therefore the reliance of the Commission on the Sanders case for the proposition that station licensees have no rights whatever is without avail.

I conclude that the United States Court of Appeals has power to issue stay orders, that the petitioners are within the class of persons named in the statute as entitled to appeal, and that on the face of their petitions for stay orders and petitions for appeal, they have made such a prima facie case of erroneous action by the Commission in denying them a hearing as warrants the issuance of the stay orders applied for.

[fol. 35] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

[Title omitted]

ORDER TO TRANSMIT CERTIFICATE—Filed August 8, 1941

It is this eighth day of August, 1941, Ordered that the Clerk of this Court be, and he is hereby, directed to transmit the certificate of the United States Court of Appeals for the District of Columbia in the above entitled cause to the Supreme Court of the United States for a determination of the question therein certified.

By the Court:

(Signed) D. Lawrence Groner, Chief Justice.

[fol. 36] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CERTIFICATE OF CLERK

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 34, both inclusive, constitute the original certificate of said Court of Appeals to the Supreme Court of the United States filed in the case of Scripps-Howard Radio Company, Appellant, vs. Federal Communications Commission, No. 7657 in said Court of Appeals, and that the signatures thereto appearing on page 5 are the true signatures of D. Lawrence Groner, Chief Justice, and Harold M. Stephens, Justin Miller, Fred M. Vinson, Henry W. Edgerton, and Wiley Rutledge, Associate Justices, respectively, of the said United States Court of Appeals for the District of Columbia, duly commissioned and qualified;

I further certify that pages 6 to 34, both inclusive, of said certificate constitute a true copy of the opinion of said Court of Appeals and of the dissenting opinion referred to in the fourth paragraph of said certificate and made a part of said certificate in said case; and that page 35 constitutes a true copy of the order to transmit certificate, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court of Appeals, at the City of Washington, in the District of Columbia, this 8th day of August, A. D. 1941.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

Endorsed on Cover: File No. 45836. U. S. Court of Appeals for the District of Columbia. Term No. 508. Scripps-Howard Radio, Inc., (Certificate) vs. Federal Communications Commission. Filed August 13, 1941. Term No. 508 O. T. 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 508.

SCRIPPS-HOWARD RADIO, INC.,

v.

FEDERAL COMMUNICATIONS COMMISSION.

On Certificate from the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE APPELLANT.

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IN THE

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OCTOBER TERM, 1941.

No. 508.

SCRIPPS-HOWARD RADIO, INC.,

v.

FEDERAL COMMUNICATIONS COMMISSION.

On Certificate from the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE APPELLANT.

OPINION BELOW.

This case being here on certificate prior to ruling by the lower court, there is no opinion. The case is before the United States Court of Appeals for the District of Columbia on the appellant's petition that the Court order a stay of the effectiveness of the contested action of the Federal Communications Commission. The matter was argued before Associate Justices Stephens, Miller and Rutledge.

February 3, 1941, two opinions were entered, the majority opinion by Justice Miller, concurred in by Justice Rutledge, holding that the Court of Appeals does not have power to grant the relief requested, and the minority opinion by Justice Stephens, holding that the Court does have such power. These opinions are printed at R. 4-48.

The appellant petitioned for rehearing of the matter before the six members of the Court *en banc*. This petition was granted, which is tantamount to setting aside the opinion of the panel of three judges. After briefs and reargument before the full Court, the judges were equally divided and the question of the Court's power was certified.

JURISDICTION.

Certificate from the United States Court of Appeals for the District of Columbia is provided for by Section 239 of the Judicial Code, 28 U. S. C. 346.

STATEMENT OF THE CASE.

Appellant is licensee of a radiobroadcasting station. The Federal Communications Commission granted authority to another station in another city to operate at appellant's frequency. This action was taken without notice to or hearing accorded the appellant. Appellant, pursuant to Section 405 of the Communications Act of 1934 and Section 1.271 of the Rules and Regulations of the Commission (reprinted in the appendix), filed its petition under oath for hearing or rehearing. The petition was denied. The appellant then appealed to the United States Court of Appeals for the District of Columbia, pursuant to Section 402(b) (2) of the Communications Act, setting up that it was a person aggrieved and whose interests were adversely affected by the action of the Commission in that such action, taken as it was without notice or hearing and upon denial of a requested hearing, would result in destructive electrical interference bringing about substantial reduction of appellant's service area contrary to the public interest, convenience

and necessity in violation of the Commission's regulations, the Communications Act and the due process clause of the Fifth Amendment.

QUESTION PRESENTED.

"Where, pursuant to the provisions of Section 402(b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?"

SUMMARY OF ARGUMENT.

I. The power to issue a stay order *pendente lite* is a concomitant of the Court's power to reverse decisions of the Commission and compel obedience to the reversal, as specified in Section 402(e).

II. The legislative history of Section 402(b) indicates an intention that the Court of Appeals may enter stay orders.

(a) It had been the practice to issue such orders under an identical statute at the time 402(b) was enacted and this had been reported to Congress.

(b) The effort to prevent the issuance of such orders had been made and had failed and this was reported to Congress.

(c) The provision for stay orders in Section 402(a) and the omission of specific provision in 402(b) is not indicative of an intention to prevent stay orders in radio cases; it is merely evidence of the conglomerate character of the statute.

(d) The failure of Congress to reenact H. R. 7716 after the pocket veto is not indicative of an intention to prevent stay orders.

(i) The failure to reenact the statute is equivocal.

(ii) H. R. 7716 must be considered against the background of *General Broadcasting System* v.

Bridgeport Broadcasting Station which shows the real reason for H. R. 7716 was a desire to provide for hearing and bond, not a desire to create authority for stay orders.

III. The decision of this Court in the Pottsville case does not abolish the analogy of appellate-to-inferior-court relationship, the decision merely cuts down the analogy to its proper proportion; it does not operate to deprive the appellate court of what is essentially an appellate jurisdiction; it leaves the Court with all statutory power to issue all necessary remedial writs in aid of its appellate jurisdiction, including the power to stay a decision of the Commission.

IV. Even if the appellate court analogy be entirely destroyed, the appeal to the Court of Appeals from a decision of the Federal Communications Commission must be regarded as an original suit in equity with all power in the court to issue interlocutory decrees for the protection of the appellant's property.

V. In general, in dealing with appellate stay of administrative orders, Congress has not specifically provided for such stays but has relied on the general power of the Courts to authorize stays; mostly, legislative reference to stay orders has assumed the Courts' power and has gone on to restrict its exercise.

ARGUMENT.

I. The power to issue a stay order pendente lite is a concomitant of the Court's power to reverse decisions of the Commission and compel obedience to the reversal, as specified in Section 402(e).

Section 402(e) of the Communications Act of 1934, outlining procedure on appeal to the Court of Appeals from decisions of the Commission, provides that after hearing the appeal, the court is to have power to enter a judgment affirming or reversing the decision of the Commission. It goes on to provide "... in event the court shall render a decision and enter an order reversing the decision of the Commission, it

shall remand the case to the Commission to carry out the judgment of the court. . . . The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States. . .".

In the present case the notice of appeal alleges that both public and private interests are adversely affected by the Commission's decision without any hearing accorded the appellant and that if afforded an opportunity to make proof, the appellant could show that the action of the Commission would result in severe electrical interference and that the action of the Commission is contrary to the public interest for reasons specified (R. 21).

When the present appeal comes on for final hearing the Court will affirm or reverse the Commission's decision. If the Commission's decision is reversed the Court would hold as a matter of law that the Commission is not authorized to reduce the appellant's service area through electrical interference without a hearing. The court would force obedience to that rule of law. The Court would remand the case to the Commission to carry out the judgment of the Court, which is to say, with instructions that the Commission is not to grant the application involved without according appellant a hearing. The Commission would be bound to act upon the correction.

The Court of Appeals would lay bare the error and would compel obedience to its correction (*Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 145).

With the Court of Appeals having that power, it is necessarily concomitant that the Court should be able to preserve the power and keep it effective. If the allegations of the notice of appeal, which now stand admitted, are, in the discretion of the Court of Appeals, sufficient to impress that court that interlocutory preservation of the *status quo* is necessary to render effective the court's final order, there is no good reason why the power should not now be exercised. Otherwise the power of reversal conferred upon the court by Section 402(e) would be meaningless.

II. The legislative history of Section 402(b) indicates an intention that the Court of Appeals may enter stay orders.

(a) It had been the practice to issue such orders under an identical statute at the time 402(b) was enacted and this had been reported to Congress.

The radio appeals section of the Communications Act of 1934, Section 402(b), is copied from the act theretofore in effect and is substantially identical with Section 16 of the Radio Act of 1927 as it stood when it was superseded by the Communications Act. Prior to June 1, 1930, the appeals section was different, as it had provided an administrative or revisory supervision by the Court of Appeals in the same field (*Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Company*, 289 U. S. 266).

In reenacting the appeals provision verbatim Congress must have intended that the courts should continue to understand the statute as they had done theretofore (*Helvering* v. *Wilshire Oil Company*, 308 U. S. 90, 99; *Heald* v. *District of Columbia*, 254 U. S. 20, 22-23).

Both under the Radio Act of 1927 and the Communications Act of 1934, the Court of Appeals "had consistently over a long period of years, and without objection on the part of the Commission, issued stay orders in cases in which such action was necessary in aid of (the) Court's appellate jurisdiction . . ." (R. 2).

It is to be observed that with the exception of the *Pottsville Case, supra*, every case coming to the United States Supreme Court, namely, the *General Electric Case, supra, Nelson Brothers Bond & Mortgage Company, supra, Fly* v. *Heitmeyer*, 309 U. S. 146, and *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, stay orders have been issued by the Court of Appeals.

In *Trinity Methodist Church, South* v. *Federal Radio Commission* (certiorari denied, 284 U. S. 685), the appellant petitioned this Court for a writ of certiorari addressed to the refusal by the Court of Appeals to issue a preliminary

stay order. In the brief for the Commission in opposition, power of the Court to issue such order was conceded and the brief addressed itself to other considerations (No. 559, October Term, 1931).

In the Third Annual Report of the Commission to Congress filed in November 1929, the Commission called to the attention of Congress the issuance of an order to stay execution of the Commission's decision in the *General Electric Case* (Report, p. 72).

In the Fourth Annual Report, filed in December 1930, the Commission reported to Congress a controversy then going on in the United States Court for the District of Connecticut as to the propriety of the issuance by the Court of Appeals of the District of Columbia of a stay order in a matter over which it does not have appellate jurisdiction and the question whether action of the Commission taken pursuant to stay orders issued by the Court of Appeals constituted a "revocation" of a station license (Report, p. 47).

The practice of the Court of Appeals to issue stay orders was so firmly established that Moncure Burke, Esq., former Clerk of the Court and author of Notes on Practice of the Court of Appeals of the District of Columbia, in the Supplement to the second edition of those Notes, published August 15, 1931, set up a form of petition for such stay order (page 11).

(b) The effort to prevent the issuance of such orders had been made and had failed and this was reported to Congress.

The question of the power of the Court of Appeals to issue a stay order was questioned by the Federal Radio Commission at the start of its administration of the Radio Act of 1927. In the Third Annual Report of the Commission to Congress, filed November 15, 1929, the Commission, in reporting on appeals then pending said:

> "A petition for 'stay order' has been filed in these cases, appellants relying on the decisions of the Court in

the WGY case (by which is meant the order of the Court granting a stay order in the *General Electric* case) and, which, if issued, as requested, would effectually prevent use of any of the channels pending final judgment by the court. Motions to dismiss these petitions have been filed by the commission on the theory that the Court of Appeals is without jurisdiction to issue such a writ." (Report, p. 77).

In reference to the WGY case the Commission said:

> "Preliminary to taking the appeal, station WGY had applied to the Court of Appeals for an order to stay execution of the Commission's decision, and this was granted."

In the cases referred to in the report the Commission's motion to dismiss petitions for stay orders was denied and the Commission did not thereafter question the Court's power until the present case. The present petition for stay was filed April 11, 1940. On February 23, 1939, the Commission filed in *Crosley Corporation* v. *Federal Communications Commission*, No. 7351 in the Court of Appeals a document entitled "Opposition to Petition for Stay Order" wherein it was stated by the Commission:

> "Now comes Federal Communications Commission, appellee herein, and in opposition to appellant's petition for stay order respectfully shows the court:
>
> "At the outset the Commission desires to make its position clear with respect to its Opposition to appellant's Petition for Stay Order. The Commission has not opposed in the past, and does not propose in the future to oppose the granting of a stay or such interlocutory restraining order by this court as may be necessary to protect the appellate jurisdiction of the court or preserve the *status quo* pending determination of an appeal from an order of the Commission, in any case where such a stay or restraining order appears reasonably to be necessary or advisable." (page 1)

(c) The provision for stay orders in Section 402(a) and the omission of specific provision in 402(b) is not indicative of an intention to prevent stay orders in radio cases; it is merely evidence of the conglomerate character of the statute.

The Communications Act of 1934 is a conglomerate, placing in the newly created Federal Communications Commission the powers which had theretofore been exercised by the Interstate Commerce Commission with reference to telegraph and telephone carriers, the powers which had theretofore been exercised by the Federal Radio Commission with regard to radio and certain powers of the Postmaster General under the Post Roads Act.

The appellate jurisdiction which had been provided in the case of decisions of the Federal Radio Commission was reenacted. There had been no appellate procedure as regarded actions of the Interstate Commerce Commission. Such actions had been reviewed under the provisions of an Act of October 22, 1913, 38 Stat. L. 219, relating to the enforcement or setting aside of orders of that Commission. That provision was also embodied into the Communications Act of 1934, as related to the regulation of the identical subject matter. Section 402(a) of the Communications Act made applicable the same procedure for orders of the new commission except as to those orders which were the subject of appeal under Section 402(b) in radio matters.

This makes it obvious that it was the intention of the Act that the methods of review theretofore obtaining with regard to the two classes of regulatory authority should continue. This makes no way for the argument that the description in 402(a) of a method for obtaining injunctive relief against common carrier regulation precludes the use of stay orders as a concomitant of appeals in radio regulation.

(d) The failure of Congress to reenact H. R. 7716 after the pocket veto is not indicative of an intention to prevent stay orders.

(i) The failure to reenact the statute is equivocal.

In the 71st Congress, Third Session (1931), Congress had under consideration H. R. 11635 to amend the Radio Act of 1927. Section 9 of the Senate bill struck out the appellate provisions of the Radio Act of 1927 and set up a more detailed procedure.

By paragraph (h) of that section, as passed by the Senate, it was provided:

> "The court may, . . . upon notice to the commission, and to all other parties to the appeal, after hearing, and for good cause shown, enter an order staying action of the commission under the order appealed from, in whole or in part, upon the giving of a bond by the party applying for the stay in such amount and with such terms and conditions as the court may deem proper. Pending a hearing upon the application for stay, the court may enter a temporary stay for a period of not to exceed fifteen days."

Senate Report No. 1578 which accompanied this bill stated:

> "Specific provision is made for stay orders upon the giving of a bond, with authority in the court to enter a temporary stay for a period not to exceed 15 days."

H. R. 11635 died in the conference committee. The provision relating to stay orders was carried over verbatim in section 10(f) of H. R. 7716, 72nd Congress. H. R. 7716 passed both Houses but did not become law because of pocket veto.

The provision concerning stay orders was but a part of a general recanvass of appellate procedure. The Court of Appeals was issuing stay orders as a regular practice. That Congress was familiar with this is indicated not only by the Commission's annual reports but also by the follow-

ing discussion of H. R. 7716 by the Chairman of the House Committee:

> "Mr. Linthicum. Should there not be some provision by which a station could give bond and then appeal, to determine this question (of suspension)? When they are once suspended that practically ruins the station forever. It seems to me if there was some provision by which they could give bond until they had a hearing upon the appeal, it would be better."
>
> "Mr. Davis (Chairman of the House Committee). *Well, they may now, under certain conditions*, but even after this bill is enacted they may, which however, is within the discretion of the court to which the case is appealed." 75 Cong. Rec. 3682 (1932). (Italics ours.)

The Senate Report (No. 1578) on H. R. 11635 said:

> "Specific provision is made for stay orders upon the giving of a bond, with authority in the court to enter a temporary stay for a period not to exceed 15 days."

The bill not having become law, the failure of Congress to reenact it can well be due to the abandonment of the desire to make *specific* provision for the stay and the requirement for bond and notice, thus permitting the Court to go on as it had previously, entering stay orders *ex parte* and without bond. The fact that the statute would have been *specific* authority for a practice then continuing under *general* law prevents this Congressional non-action from having interpretative significance.

(ii) H. R. 7716 must be considered against the background of General Broadcasting System v. Bridgeport Broadcasting Station, Inc., which shows the real reason for H. R. 7716 was a desire to provide for hearing and bond, not a desire to create authority for stay orders.

During 1930 and 1931 there were several efforts to revise and improve the appellate procedure under the Radio Act of 1927. Because of the decision of this Court in the *General Electric case, supra,* and the desire in Congress that

"radio law" receive authoritative pronouncement from this Court, the act was first amended by changing the character of review exercised by the Court of Appeals so as to make the power of that Court judicial instead of administrative.

Also, the appeal provisions were enlarged to permit appeals not only by persons whose applications were denied, but also by other persons, such as existing licensees who might be adversely affected by the grants of applications of others. (Act of July 1, 1930, 46 Stat. 844.)

It was in connection with this revision that the matter of a stay order was given Congressional study.

At that time there was pending in the Court of Appeals for the District of Columbia and in the United States Court for the District of Connecticut a controversy between General Broadcasting System, Inc., licensee of WGBS, New York, and Bridgeport Broadcasting Station, Inc., licensee of WICC, Bridgeport. (*General Broadcasting System, Inc.* v. *Federal Radio Commission*, 60 App. D. C. 64, *General Broadcasting System, Inc.*, v. *Bridgeport Broadcasting Station, Inc.*, *Bridgeport Broadcasting Station, Inc.* v. *Federal Radio Commission*, 53 F. (2d) 664). The Commission, on hearing three conflicting applications for the use of the 600-kilocycle frequency, then being used by WGBS, had awarded it to WICC. WGBS sued out an appeal in the District of Columbia and obtained a stay order. Prior to service of the stay order the Commission sent out the license. WGBS obtained an enlargement of the stay order to require the Commission to recall the license. WICC contended that this recall was a revocation of its license and undertook to appeal to the United States Court for the District of Connecticut, as was then authorized by the statute. Regarding the recall as illegal, WICC persisted in broadcasting at 600 kilocycles. In the United States Court for the District of Connecticut, WGBS brought an injunction suit to restrain operation by WICC. On this a temporary restraining order was entered after bond was given by WGBS. The Court of Appeals for the District of Co-

lumbia affirmed the decision of the Commission in February of 1931. This dissolved the stay order entered by the Court of Appeals. The question was then before the United States Court in Connecticut as to costs, bond, etc.

The District Court in August, 1931, held that the stay order theretofore issued by the Court of Appeals for the District of Columbia, having been granted prior to the effectiveness of the Act of July 1, 1930, was entered in an administrative proceeding where the court had no judicial functions. It said:

> "There is no question here as to the power of the Court of Appeals to issue a stay order or writ of supersedeas in the exercise of its judicial function. Instead, the question is whether said court in the performance of an administrative duty, cast upon it by the Radio Act has that power." P. 667.

It was held that the Court of Appeals did not have such power and that its stay order had been invalid. On rehearing, the Court held, on November 30, 1931, that the administrative Court of Appeals had not drawn on its judicial powers for the issuance of the stay order because no bond had been required. These questions had been before the Courts in 1930 and in 1931 and the question of bond was taken up in connection with the general revision of the appellate procedure.

Since no one had questioned the power of the Court of Appeals in its new judicial capacity to issue stay orders, and since such stay orders had been uniformly issued without hearing and without bond, it becomes apparent that the purpose behind the particular revision of H. R. 7716 was the purpose to bring stay orders against the Federal Radio Commission within the class of stay order on appeal where bond is required, and further to provide for a more orderly method of issuing such stay orders by requiring that requests therefor be set down for hearing or argument. Had there been any question of the court's power, it might then be possible to interpret H. R. 7716 as

undertaking to confer the power but all of the circumstances, both current and historical, run contrary.

III. The decision of this Court in the Pottsville case does not abolish the analogy of appellate-to-inferior court relationship, the decision merely cuts down the analogy to its proper proportion; it does not operate to deprive the appellate court of what is essentially an appellate jurisdiction; it leaves the Court with all statutory power to issue all necessary remedial writs in aid of its appellate jurisdiction, including the power to stay a decision of the Commission.

The organic act creating, and establishing the jurisdiction of, the Court of Appeals, provides that it "shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction" (Feb. 9, 1893, 27 Stat. 436, c. 74, sec. 11; Mar. 3, 1901, 31 Stat. 1227, c. 854, sec. 230).

Viewed as a Circuit Court of Appeals of the United States (e.g., *Federal Trade Commission* v. *Klesner*, 274 U. S. 145, 150-158), the Court has even wider powers, including those to issue all writs not specifically provided for by statute, which may be necessary for the exercise of . . . (its) jurisdiction(s), and agreeable to the usages and principles of law." (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)

Both these statutes gave character and authority to the Court of Appeals prior to the enactment of the Radio Act of 1927. That statute provided for review by *appeal* to the Court of Appeals for the District of Columbia. The word "appeal" was used in the amendment of July 1, 1930 and when the amended statute was carried over into the Communications Act of 1934, it was again used. "Appeal" is a word having a traditional and well-recognized significance. It is understood to invoke appellate powers and appellate jurisdiction. It must of necessity, therefore, invoke the power of court to issue remedial writs in aid of that jurisdiction. Even if the jurisdiction is not strictly appel-

late, the general statute applicable to all Circuit Courts of Appeals makes the remedial writs useable in aid of any jurisdiction. And this Court, in reliance on just such an all-writs statute, has itself stayed the effectiveness of an order of the Interstate Commerce Commission. (*Omaha & Council Bluffs Street Railway Company* v. *Interstate Commerce Commission*, 222 U. S. 582.)

It appears unlikely that the appellate power to suspend the order complained of would be questioned were it not for the decision of this Court in the *Pottsville* case, *supra*. There the Court of Appeals had undertaken to instruct the Commission in the manner of complying with the reversing order to the same extent that it would have instructed an inferior court under similar circumstances. It was held by this Court that the Court of Appeals had injected itself into the determination of nonjudicial matters properly within the administrative function of the Commission. It was held that the Court-Commission relationship was not so closely analogous to the superior-inferior court relationship as to permit this intrusion. The distinction was made between the performance of the power over interstate commerce by the Commission and the performance of constitutional judicial powers by the Court (p. 141). The difference was pointed up by reference to differences in practice between courts and commissions (p. 143). But the essential function of the court in the correction of errors of law and in compelling the Commission on remand to act in accordance with law was reaffirmed in the *Pottsville* case (p. 145).

It is to be observed that what is sought by the present appeal is a ruling by the Court of Appeals that as a matter of law the Commission is without power to circumscribe the service of appellant during its license period without a hearing. No request is or can be made of the Court for instruction to the Commission as to the time, place, circumstances or manner of hearing, and no intervention by the Court in the administrative process of the Commission is sought. Surely in these circumstances the *Pottsville* case

cannot be read to terminate the appellate function of the Court entirely, to deprive it of the power to lay bare errors of law or to compel obedience to the correct rule of law. To read the *Pottsville* case as so utterly depriving the Court of Appeals of its appellate characteristics in relation to the Commission is to interpret that decision as effectively depriving the appellate remedy of significance.

IV. Even if the appellate court analogy be entirely destroyed, the appeal to the Court of Appeals from a decision of the Federal Communications Commission must be regarded as an original suit in equity with all power in the court to issue interlocutory decrees for the protection of the appellant's property.

The Court of Appeals is a constitutional court, created under authority of Article 3, Section 1 of the Constitution. It functions in a judicial capacity and an appeal from the Commission to the Court is a case or controversy within the meaning of the Constitution. Whatever be its name, some cause of action, some adjudication of rights is taking place when an appeal is taken.

While it is true that the licensee of a radiobroadcasting station has no property rights whatsoever as against the properly exercised regulatory power of the Federal Government, it is nevertheless true, as persuasively shown by the opinion of Mr. Justice Miller below (R. 11 to 13), that the appellant is taking into the Court of Appeals for adjudication some rights which are justiciable. During the term of a radiobroadcasting license, a licensee may not be disturbed in the exercise of his license, except in accordance with the procedure provided for by law and he may challenge any action of the Commission or of any private person which infringes upon the rights conferred by his license. When the license has expired the applicant has no property right to a renewal thereof, but while the license is in effect the licensee may not be disturbed except by lawful regulation or by the revocation procedure provided for in

the statute. Should there be any action by the Commission in granting a license to another person which impinges upon the rights of the existing licensee which are recognized by statute, that licensee may appeal. (*Journal Company* v. *Federal Radio Commission*, 60 App. D. C. 92.) If the analogy of ordinary appellate procedure is not applicable, then the appeal is in effect an original suit, whereby the appellant seeks to have the Court of Appeals prevent the Commission from unlawfully trespassing upon the appellant's rights. Under such an aproach the applicable analogy is to a suit to restrain the enforcement of an invalid administrative order.

As was said by this Court in *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Company, supra*, at page 277:

> "If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not 'be misled by a name, but look to the substance and intent of the proceedings.'"

So regarded there should be no question that the all-writs clause confers upon the Court of Appeals as a Circuit Court of Appeals the power to preserve the *status quo*.

And this is an important power in the preservation from electrical interference of an existing radio service, lest through arbitrary action without appellate relief the regulatory body could restore to the field of radiobroadcasting the chaotic interference conditions which allegedly prevailed prior to 1927 and which led to the necessity for a regulatory body.

V. In general, in dealing with appellate stay of administrative orders, Congress has not specifically provided for such stays but has relied on the general power of the Courts to authorize stays; mostly, legislative reference to stay orders has assumed the Courts' power and has gone on to restrict its exercise.

After the testing out of the method of appeal provided for in connection with radio cases, Congress over the years has created similar appellate remedies for a number of other similar administrative tribunals. In all but one of these instances reliance was had upon the general powers of Circuit Courts of Appeal to issue stay orders and no specific authority for the issuance of such stay orders was enacted. The Congressional solicitude was only that the stay orders should not be entered automatically but should be entered only on specific order of the Court.

In 1933 there was established an appellate procedure covering decisions of the Securities and Exchange Commission. It is provided by 15 U. S. C. 77 i, that any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States. It is also provided: "(b) the commencement of proceedings under subsection (a) is not, unless specifically ordered by the Court, to operate as a stay of the Commission's order".

In connection with the Federal Power Commission, it was provided in 1938 that any party to the proceeding relating to natural-gas companies could obtain review in Circuit Courts of Appeal of the United States, and that the commencement of such proceedings should not, unless specifically ordered by the court, operate as a stay of the Commission's order, 15 U. S. C. 77 r. The same provision is made in 15 U. S. C. 836 (b) in reference to the National Bituminous Coal Commission, in 16 U. S. C. 825 l (c), in reference to conservation powers of the Federal Power Commission and in 29 U. S. C. 160 (f) (g) in respect to the National Labor Relations Board. As regards the Fed-

eral Alcohol Administration Act, 27 U. S. C. 204 (h), the provision is that the commencement of proceedings shall, unless specifically ordered by the court to the contrary, operate as a stay of the administrator's order. As regards the Civil Aeronautics Authority, specific provision is made for stay by 49 U. S. C. 646: "Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or such other relief as may be appropriate."

That the action of the Alcohol Administrator is automatically stayed unless ordered otherwise and that specific authority for stay is given in connection with aeronautical regulation does not alter the fact that in all the other statutes the legislation is limiting in effect. If the all-writs clause is insufficient to permit the exercise of the court's jurisdiction in granting stays no additional authority is conferred by the statutes cited and the limiting language that the appeal will not operate as a stay unless so ordered would be meaningless. Surely these statutes are continued recognition by Congress of the applicability of the general jurisdiction of the court to grant interlocutory stays.

CONCLUSION.

This case concerns relationship between courts and administrative agencies. As Mr. Chief Justice Stone has stated:

> ". . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action." *United States* v. *Morgan*, 307 U. S. 183, 191 (1939).

The basic issue is whether the courts have been endowed with sufficient statutory authority to act as an instrumentality of justice "in securing the plainly indicated objects of the statute." If the lower court lacks the power to maintain the *status quo* pending an appeal, then its judicial functions are impaired to the extent that the judgment of the court may not be effectuated. The subject matter of the appeal may be gone. This might nullify the provisions for review and prohibit the court from carrying out the duties defined by the words of the statute—"to carry out the judgment of the court." The "all-writs" clause must of necessity be part of the appellate jurisdiction of the courts; to read it out of the statute would endanger judicial review.

The issuance of the stay order will not result in an unwarranted interference with the administrative process. The objective sought by the stay is the same objective sought by the reversal on the merits except for the necessary difference betwen a final and interlocutory order.

The question certified by the court below should be answered in the affirmative.

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ACKNOWLEDGMENT OF SERVICE

Receipt is acknowledged of a copy of the foregoing brief.

FEDERAL COMMUNICATIONS COMMISSION

By .....
TELFORD TAYLOR,
General Counsel.

January 20, 1942.

APPENDIX.

Section 402, Communications Act of 1934.

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter

permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however*, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against

the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

Section 262, Judicial Code.

§ 377. "*Power to issue writs.* The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)"

Section 230, District of Columbia Code.

"*Writs.* The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction. (31 Stat. 1227, c. 854, Sec. 230.)"

Section 405, Communications Act of 1934.

SEC. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those

arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

Section 1.271, Rules and Regulations, Federal Communications Commissions.

"*Petitions; contents.* Any party whose interests are aggrieved or adversely affected by any decision, order, or requirement of the Commission may file a petition for rehearing of the same or any matter determined therein as provided in section 405 of the act. Such petition for rehearing may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing under title III of the act; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding, or (5) other relief. Such petition shall be specific as to the form of relief sought and, subject to this requirement, may contain alternative requests. Each such petition shall state with particularity in what respect the decision, order, or requirement or any matter determined therein is claimed to be unjust, unwarranted, or erroneous, and with respect to any findings of fact must specify the pages of record relied on. Where the existence of newly discovered evidence is claimed, the petition must be accompanied by a verified statement of the facts, together with the facts relied on to show that the petitioner, with due diligence, could not have known or discovered such facts at the time of the hearing."

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No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1941

SCRIPPS-HOWARD RADIO, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINION BELOW

An opinion of the Court of Appeals and a dissenting opinion of Justice Stephens were entered on February 3, 1941, and are printed in the record at pages 4–18 and 19–48, respectively. The Court of Appeals later set aside its opinion and, after reargument, issued its certificate to this Court (see R. 2).

JURISDICTION

The jurisdiction of this Court is invoked under Section 239 of the Judicial Code, 28 U. S. C. § 346. There is, however, a question, discussed *infra*, pp. 11–14, whether this Court has jurisdiction.

QUESTIONS PRESENTED

The question certified by the United States Court of Appeals for the District of Columbia reads as follows (R. 3):

> Where, pursuant to the provisions of Section 402 (b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?

The certification of this question in turn presents the questions whether the United States Court of Appeals for the District of Columbia has power to certify to this Court a question arising out of an appeal to that court from an order of the Federal Communications Commission, and, if so, whether the certificate here involved is defective as being of objectionable generality.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Appendix A, *infra*, pp. 36–46.

STATEMENT

The facts as stated in the certificate (R. 1–2) and as supplemented by pertinent facts not in dispute shown by the Commission's opinions and

orders, which are set forth in Appendices B and C, *infra*, pp. 47–60, may be summarized as follows:[1]

Appellant is the licensee of radiobroadcasting station WCPO, which operates in Cincinnati, Ohio, on 1200 kilocycles with 250 watts power. In October 1939 the Commission granted without hearing[2] the application of WCOL, Inc., licensee of Station WCOL at Columbus, Ohio, for a construction permit authorizing it to install the equipment necessary to change its frequency from 1210 kilocycles to 1200 kilocycles and to increase its power from 100 watts to 250 watts (Appendix B, *infra*, p. 47).

[1] Certain of the procedural steps taken by the court below and the dates thereof are set forth in the statement though not included in the certificate or shown by the Commission's opinions or orders. These, together with the pertinent facts not stated in the certificate but shown by the Commission's opinions and orders, are set out in the belief that they will aid in an understanding of the issues raised by the certificate. Although in other cases this Court has declined to consider facts not stated in the certificate, it may wish to do so here where the additional facts are undisputed and where many of them are within the scope of judicial notice. Cf. *United States* v. *Thomas*, 151 U. S. 577, 580, 581; *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 307.

[2] One of the issues raised by the appeal is the validity of the Commission's action in granting the application of WCOL without a hearing. The Commission has held (see Appendix B, *infra*, p. 52) that Section 309 (a) of the Communications Act of 1934 specifically confers this power on it. The court below has postponed argument and decision on the merits until after disposition of the petition for stay.

Appellant filed with the Commission a "petition for hearing or rehearing" directed against the grant of the WCOL application. The Commission denied this petition and on April 2, 1940, issued an opinion (Appendix B, *infra*, pp. 47–56) in which it pointed out that although the grant of the WCOL, Inc., application would mean a loss of 20,800 listeners within the primary service area of appellant's station, it would result in an increase of 146,000 listeners within the interference-free service areas of WCOL and of WHIZ and WLOK, located in Zanesville and Lima, Ohio, respectively (Appendix B, *infra*, p. 55–56).

On April 11, 1940, appellant filed in the court below its appeal from the Commission's orders granting the construction permit and denying appellant's "petition for hearing or rehearing." At the same time it also filed a petition for an order "suspending the effectiveness" of the Commission's decision granting the permit to WCOL, Inc., pending determination of the appeal. (R. 1, Appendix C, *infra*, p. 57.)

After WCOL, Inc., had completed the changes authorized by its construction permit, it applied to the Commission for a station license in accordance with Section 319 (b) of the Communications Act[1] (Appendix C, *infra*, p. 58). Thereupon

[1] Under Section 319 the construction permit issued by the Commission does not authorize operation of a station but only its construction. Under Sections 301 and 319, a license is necessary before regular operation can begin.

appellant filed in the court below a supplement to its petition for a stay order praying that the terms of the order should be extended to stay the issuance of a license. On June 3, 1940, the Commission granted the application of WCOL, Inc., for a station license.[4] Thereafter, appellant filed with the Commission its "petition for hearing or rehearing" of the Commission's action in issuing the license to WCOL, Inc. The Commission denied this petition on July 19, 1940. (Appendix C, *infra*, pp. 58–60.)

On July 24, 1940, appellant appealed to the court below from the grant of the station license, and a month later the two appeals were consolidated.

Briefs in support of and in opposition to the petition for stay were filed with the court below

[4] In view of the facts that the changes authorized by the construction permit have been completed and that WCOL, Inc., already has been granted a license to operate, it is arguable that the question certified, as distinct from the merits of the appeal to the court below, is moot and that the certificate should be dismissed for that reason. However, we do not so contend. Appellant's prayer for an order suspending "the effectiveness" of the grant of the construction permit may be construed broadly in the light of the apparent purpose of the petition for stay as the equivalent of a prayer for an order which would prevent WCOL, Inc., from operating pending the appeal. Moreover, the power of the Court of Appeals to issue stays on appeals from the Commission is a question which involves public interests and is likely to recur. Cf. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 304–305; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516.

and oral argument was had on November 15, 1940. On February 3, 1941, the court, with one justice dissenting, denied the petition for stay and rendered an opinion holding that it had no power to stay action of the Commission pending disposition of an appeal (R. 2, 4–48). Thereupon appellant filed a motion for reargument before all six judges composing the Court of Appeals. On March 13, 1941, the Court granted the motion and thereafter set aside its opinion. Reargument was had before the full court on April 7, 1941 (R. 2). No further action was taken by the court until August 8, 1941, when it issued its certificate to this Court.

SUMMARY OF ARGUMENT

I

A. Some doubt exists as to whether the Court of Appeals possesses the power to certify questions arising on appeals to it from the Federal Communications Commission. The general authorization to certify questions found in Section 239 of the Judicial Code would seem to be broad enough to cover all types of cases in the Court of Appeals. However, Section 402 (e) of the Communications Act provides that the judgment of the Court of Appeals shall be final subject to review by this Court upon writ of certiorari, and makes no mention of certification. Moreover, a predecessor bill relied on in the drafting of the Communications Act made provision for both certification and cer-

tiorari, and the provisions of many other statutes governing the review of action taken by administrative agencies specify both certification and certiorari as methods of review by this Court.

B. Even if the Court of Appeals has authority to certify the present question to this Court, the certificate should be dismissed because the question certified is of "objectionable generality." The question certified is not in terms limited to whether the Court of Appeals has power under the Act to grant a stay of the particular order or type of order issued by the Commission in this case, but apparently asks whether the Court has power to stay the execution of any order of the Commission appealed pursuant to Section 402 (b) of the Communications Act. To answer the question, this Court would be obliged to consider the various types of orders which may be appealed under Section 402 (b) and all situations which might possibly arise thereunder.

II

A. The Communications Act of 1934 withholds from the Court of Appeals the power to grant a stay order in appeals under Section 402 (b). Thus, while Section 402 (a) of the Act, which provides for appeals to three-judge courts in cases not appealable to the Court of Appeals under Section 402 (b), incorporates by reference the preliminary injunction procedure of the Urgent Deficiencies Act, no similar provision is made in

connection with appeals under Section 402 (b). The nature of the respective types of Commission action reviewable under these sections reinforces the conclusion that this omission reflects a deliberate Congressional judgment.

Section 402 (a) comprehends review of carrier matters and such radio matters as revocation of a license or modification of a license on the Commission's own motion. In these situations the grant of a stay power seems appropriate. However, in situations where Commission action is appealable to the Court of Appeals under Section 402 (b) the exercise of a stay power would involve administrative rather than judicial functions or would be otherwise inappropriate. Where, for example, an applicant appeals under Section 402 (b) (1) from Commission action denying his application for a construction permit, a license, or a modification or renewal of a license, the grant of a stay by a court would involve the exercise of an administrative judgment exclusively entrusted to the Commission by Congress.

In a case like the instant one appealed under Section 402 (b) (2) by a "person aggrieved or whose interests are adversely affected" by action of the Commission granting an application, Congressional failure to grant power to issue stay orders is explained by the nature of the interests which are concerned. A licensee who appeals from

Commission action authorizing a new station which will either compete with his existing station or cause electrical interference to it can assert no injury to a private right. See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. The right granted by the license—to operate transmitting equipment for a designated time on a certain frequency with particular power during enumerated hours of the day and night—is not infringed. Since interim stays, not necessary to safeguarding the jurisdiction of the court, are generally designed for the protection of private rights, it would be strange if Congress had provided a stay order power in situations like the instant where the jurisdiction of the court is not endangered and no such rights are involved.

The legislative history of Section 402 further shows that Congress did not intend the Court of Appeals to issue stay orders pending determination of an appeal. In drafting Section 402 Congress had before it and relied extensively on H. R. 7716, 72d Cong., a bill which had been passed by both houses of Congress one year before the enactment of the Communications Act, but failed of enactment because of a pocket veto. That bill contained an express provision conferring a stay order power on the Court of Appeals. The inclusion of such a provision in H. R. 7716 and its

omission from the Communications Act when adopted a year later is clear indication that the omission was deliberate.

B. No other statute confers upon the Court of Appeals the power to issue stay orders. Appellant relies on Section 262 of the Judicial Code and Section 33 of Title 18 of the District of Columbia Code (now found in Title 11–208, 1940 ed.) These provisions give to the Court of Appeals power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction.

These general statutes should not be construed as conferring power to stay orders of the Communications Commission, in view of the specific congressional intention, reflected in the Communications Act, to withhold such power. Moreover, the function of the Court of Appeals is limited to laying bare errors of law committed by the Commission. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. Hence, the "all writs" statute would in any event only give to the Court of Appeals the power to issue writs necessary to protect the jurisdiction of that Court to determine whether the Commission had committed errors of law. And a stay is not necessary for that purpose, since the Court of Appeals can review the Commission's action in granting the application from which appellant is appealing whether or not the action of the Commission is stayed in the interim. If the Court of

Appeals uncovers an error on final judgment, the Commission must revise its action in accordance with the directions of the Court.

ARGUMENT

THERE IS DOUBT WHETHER THE COURT OF APPEALS HAS POWER TO CERTIFY QUESTIONS TO THIS COURT ON APPEALS ARISING UNDER THE COMMUNICATIONS ACT. IN ANY EVENT, THE CERTIFICATE SHOULD BE DISMISSED BECAUSE THE QUESTION CERTIFIED IS TOO GENERAL

A. IT IS DOUBTFUL WHETHER THE COURT OF APPEALS IS AUTHORIZED TO CERTIFY QUESTIONS ARISING ON APPEALS UNDER THE COMMUNICATIONS ACT

Although the Government takes no position on the question whether the Court of Appeals is authorized to issue certificates in cases appealed to that court under the Communications Act of 1934, it is of opinion that it should at the outset call this Court's attention to the fact that the answer to the question is doubtful. We will state the considerations looking each way.

Section 239 of the Judicial Code (28 U. S. C., § 346) provides:

> In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals for the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the case * * *.

This language would appear to be broad enough to authorize the court below to certify questions

arising on appeal from the Federal Communications Commission. And as a matter of policy it would seem undesirable that any one class of cases should be singled out for exclusion from the certification power.

There are, however, some indications that Congress intended that questions arising on appeal from the Federal Communications Commission should not be brought to this Court by certificate, but only on certiorari. The provision (Section 402 (e)) of the Communications Act dealing with review by this Court of cases in the Court of Appeals speaks only of certiorari. It reads as follows:

> * * * The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

The omission from the statute of any reference to certification gains added significance from the fact that a predecessor bill which was much drawn on in the drafting of the 1934 Act did contain a provision for certification. That bill was H. R. 7716, 72d Congress, which was passed by both houses of Congress in 1933 but was pocket vetoed. See *infra*, p. 26. It provided (Section 16 (g)):

> The jurisdiction of the Court of Appeals of the District of Columbia under this sec-

> tion to review any decision or order of the commission shall be exclusive * * * and the judgment of said court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari as provided in section 240 of Judicial Code, as amended (U. S. C., title 28, sec. 347), and that nothing in this section shall be construed to prevent the application of section 239 of the Judicial Code, as amended (relating to certification of questions of law) (U. S. C., title 28, sec. 346), to cases in the Court of Appeals of the District of Columbia arising under this section.[5]

The Communications Act, in failing to provide for certification as an alternative mode of review, contrasts also with the numerous regulatory statutes which do expressly provide for Supreme Court review by certification as well as by certiorari.[6] Two

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[5] The Radio Act of 1927, which was a precursor of the 1934 Act, conferred upon the Court of Appeals power both to review and to revise determinations of the Federal Radio Commission, and contained no provision for review by this Court. See *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464. In 1930 the Radio Act of 1927 was amended to limit the Court of Appeals to purely judicial functions, so that its decisions might be reviewed by this Court. The 1930 Amendment provided for review by certiorari; like the present Act, it did not mention certification. See 46 Stat. 844, 845.

[6] See Federal Power Act, 16 U. S. C., Sec. 825 (l); Civil Aeronautics Act of 1938, 49 U. S. C., Sec. 646 (f); Securities Act of 1933, 15 U. S. C., Sec. 77 (i); Natural Gas Act, 15 U. S. C., Sec. 717 (r); Tariff Act of 1930, as amended, 19

such statutes which originally provided only for review by certiorari were changed on subsequent amendment so as to provide for certification as well.[7] There are, on the other hand, various statutes which, like the Communications Act, make provision for certiorari but contain no reference to certification.[8] No case has been found in which questions have been certified under any of these statutes.

B. IN ANY EVENT, THE CERTIFICATE SHOULD BE DISMISSED ON THE GROUND THAT THE QUESTION CERTIFIED IS OF OBJECTIONABLE GENERALITY

If the Court holds that the court below had power to issue the certificate in this case, and hence that this Court has jurisdiction, it should nevertheless dismiss the certificate.

This Court has consistently refused to answer and has said that it will not answer "abstract

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U. S. C., Sec. 1641; Securities Exchange Act of 1934, 15 U. S. C., Sec. 78 (y); Public Utility Holding Company Act of 1935, 15 U. S. C., Sec. 79 (x); National Labor Relations Act, 29 U. S. C., Sec. 160 (e); Investment Advisers Act of 1940, Sec. 213 (a), 54 Stat. 855; Federal Alcohol Administration Act, 27 U. S. C., Sec. 204 (h); Fair Labor Standards Act of 1938, 29 U. S. C., Sec. 210 (a); Bituminous Coal Act of 1937, 15 U. S. C., Sec. 836 (b).

[7] Clayton Act (Sec. 11, 38 Stat. 735) and the Federal Trade Commission Act (Sec. 5, 38 Stat. 720). Congress subsequently specifically provided for review by certification as well as certiorari (Act of Feb. 13, 1925, Sec. 2, 43 Stat. 939; Act of May 20, 1926, Sec. 13 (b), 44 Stat. 587).

[8] See, e. g., Packers and Stockyards Act of 1921, 7 U. S. C., Sec. 194 (h); Grain Futures Act, 7 U. S. C., Sec. 10.

questions unrelated to the pending controversy, or questions unnecessarily general, or questions which admit of one answer in one set of circumstances and a different answer in another, the differentiating circumstances being imperfectly disclosed." *Lowden* v. *Northwestern National Bank and Trust Co.*, 298 U. S. 160, at 162; *White* v. *Johnson*, 282 U. S. 367; *Triplett* v. *Lowell*, 297 U. S. 638; *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563; *National Labor Relations Board* v. *White Swan Co.*, 313 U. S. 23. See also Rule 37 of the Rules of this Court, which provides that questions certified "must be distinct and definite."

Under these standards, it is clear that the question certified in this case should not be answered. The question as formulated (*supra*, p. 2) is not limited to the precise issue before the court below, namely, whether in the circumstances the court has power to stay the effectiveness of the order of the Commission granting the application for a construction permit. Nor is it even limited to the question of the court's power in general to stay Commission orders of the type here involved, that is, orders granting applications for construction permits. On the contrary, it apparently asks whether the court has power to stay any order which may be appealed under Section 402 (b). Thus, to answer the question, this Court would be obliged to consider the various types of orders which are appealable

under that section and all possible factual situations which might arise. No such duty should be imposed. Indeed, for the Court to be asked to determine questions not in issue between the parties, amounts, in effect, to a request that it exceed its constitutional authority to decide cases and controversies.

The improper generality of the question certified appears most evidently when examined in the light of the different orders which may be appealed under Section 402 (b) (1), (2), and (3) and of the diverse considerations which they may raise in connection with the propriety of interim stays and the power to issue them. Under Section 402 (b) (1) an appeal may be taken by the applicant from an order of the Commission denying an application for a construction permit or license or for a renewal or modification of an existing license. Under Section 402 (b) (2)—pursuant to which the appeal was taken in the instant case—an appeal may be taken by any person aggrieved or whose interests are adversely affected by action of the Commission granting or denying an application of the type covered by Section 402 (b) (1). Under Section 402 (b) (3) an appeal may be taken by a radio operator whose license has been suspended by the Commission. As is pointed out hereinafter (pp. 20–22), so far as stay orders are concerned, the considerations which are applicable to appeals under Section 402 (b) (1) from orders

denying applications may be somewhat different from those applicable to appeals under Section 402 (b) (2) from orders granting applications, since in the former the issuance of a stay would be a clear usurpation of the administrative functions committed to the Commission. Still other considerations may be pertinent to whether an order appealed under Section 402 (b) (3) could be stayed.

In view of these facts and of the principles heretofore established governing the disposition of certified questions, we submit that the certificate should be dismissed. Cases, *supra*, p. 15. However, in the event that the Court may decide that the question certified should be answered, we shall set forth the reasons why it should be answered in the negative.

II

THE COURT OF APPEALS HAS NO POWER TO STAY ACTION OF THE FEDERAL COMMUNICATIONS COMMISSION PENDING DISPOSITION OF AN APPEAL

A. THE COMMUNICATIONS ACT OF 1934 WITHHOLDS SUCH POWER FROM THE COURT OF APPEALS

Judicial review of action of the Commission is provided for by Section 402 of the Communications Act (Appendix A, *infra*, pp. 40–43). Subsection (b) confers jurisdiction on the Court of Appeals in certain enumerated classes of cases, while all other types of Commission action susceptible of judicial review are by subsection (a) made reviewable in three-judge district courts in accord-

ance with the provisions of the Urgent Deficiencies Act (38 Stat. 219).

Nowhere in the Communications Act is there any provision which confers upon the Court of Appeals the power to stay, during the pendency of an appeal taken under Section 402 (b), the action of the Commission upon which the appeal is predicated. Three-judge courts, on the other hand, are by the provisions of the Urgent Deficiencies Act expressly given the power to issue stay orders and detailed safeguards are established to govern the issuance of such orders (Appendix A, *infra*, pp. 43–44). In view of the fact that these provisions for stay orders are incorporated by reference in Section 402 (a) and in view of the particularity with which the nature and scope of the jurisdiction of the Court of Appeals is defined in Section 402 (b) through (f) (set out in Appendix A, *infra*, pp. 40–43), the failure of Congress to confer on the Court of Appeals power to issue stay orders evinces a deliberate Congressional choice.* This conclusion is reenforced by the legislative history, discussed hereinafter at pages 25–31, and by a consideration of the types of Commission action which are made reviewable in the Court of

*The fact that in Section 405 of the Communications Act (Appendix A, *infra*, p. 43) Congress specified that no application for a rehearing before the Commission should operate to stay or postpone enforcement of the Commission's action "without the special order of the Commission," also tends to show that the omission of a stay provision in Section 402 (b) was deliberate.

Appeals and in three-judge district courts, respectively.

1. *The statutory scheme.*—Section 402 (b) authorizes appeals to the Court of Appeals from decisions of the Commission granting or refusing applications "for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license." By amendment in 1937 (50 Stat. 197) it also authorizes an appeal by "any radio operator whose license has been suspended by the Commission." All other radio matters and all common carrier matters are comprehended by Section 402 (a). See *Federal Communications Commission* v. *Columbia Broadcasting System,* 311 U. S. 132. Thus, so far as radio is concerned, Commission orders granting or denying applications for construction permits, radio station licenses, renewal of licenses, or modification of licenses are appealable to the Court of Appeals. If, however, the order involved is a revocation of a license or a modification of a license on the Commission's own motion, judicial relief must be sought before a three-judge court.[10]

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[10] The reason for conferring jurisdiction on the Court of Appeals in some cases and on three-judge courts in others is explained in the following statement of Senator Dill, the Senate sponsor of the bill which became the Communications Act of 1934:

"I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the

The difference between Commission action which goes to three-judge courts—which are given the power by statute to grant temporary relief—and that which is appealable to the Court of Appeals—which is given no such power—is significant. Cf. *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132, 136. The type of Commission order which is reviewable by three-judge courts is by and large susceptible to being temporarily enjoined while that which the Court of Appeals reviews is in the main not so susceptible. Thus, if the Commission revokes a license, it deprives the licensee of the right conferred by the license to operate transmitting equipment for a designated period on a certain frequency with specified power dur-

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District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which was granted against them or affecting them when they did not bring the case into court * * * So we provide that where the decisions of the commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdiction where the stations are located. But in the case where the applicant for the license or the permit, or whatever it may be, comes to the commission and asks for a change in his license or asks for a new license, or asks for something to be done by the commission, then if the commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." (78 Cong. Rec. pp. 8825–8826.) See also S. Rep. 781, 73d Cong., 2d Sess., pp. 9–10.

ing enumerated hours of the day or night. That is a right of a kind traditionally protected by courts of equity and the administrative action is of a kind traditionally subject to judicial stay. A similar situation exists where the Commission modifies on its own motion an outstanding license.

The situation is entirely different as respects the types of order which may be brought before the Court of Appeals under Section 402 (b) (1) and (2).[11] Here either the judicial power does not embrace stay of the Commission's action at all, or, in the situations where it does, a stay would be manifestly inappropriate. For example, if the Commission denies an application for a construction permit, or license, or modification of license, and the applicant or a person aggrieved appeals, the Court of Appeals cannot stay the Commission's action. For, if it did so it would, in effect, purport to authorize the appellant to construct or operate a station pending determination of the appeal and such an authorization would usurp administrative functions committed

[11] An order appealable under Section 402 (b) (3) (i. e., suspension of a radio operator's license) would appear to be similar to the orders appealable under Section 402 (a) as regards the propriety of a stay power. This circumstance, however, does not detract from our argument with respect to the intention of Congress in enacting the statute in 1934. Subparagraph (3) of Section 402 (b) was added by amendment in 1937. The legislative history of the amendment does not disclose the reason for making orders suspending radio operators' licenses appealable to the Court of Appeals rather than to the three-judge courts.

by the statute to the Commission. The statute authorizes the Commission to grant a permit or license upon finding that a grant will serve public interest, convenience, or necessity. Only the Commission is authorized to make that determination and to issue a permit or license; the power is administrative rather than judicial and it is not entrusted to the courts even on final disposition of an appeal. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144–145. Compare *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, with *Federal Communications Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266. *A fortiori*, the court could not make an interim determination and grant.[12]

On an appeal like that in the instant case brought under Section 402 (b) (2) by a party aggrieved by action of the Commission granting an application, the issuance of an interim stay, it is true, would not involve the exercise of an administrative as distinct from judicial function to the same degree as in the case of an appeal from a denial of an application. But there is an additional reason which may explain why Congress did not empower the court to issue a stay on such

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[12] This would be equally true in a case on appeal from a denial of an application for a renewal of a license. Under the provisions of Sections 301, 307 (d), and 309 (b) (Appendix A, *infra*, pp. 36–38), it is clear that the Communications Act recognizes no putative equity to a renewal of a license. See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475

an appeal. It is found in the nature of the interests which are possessed by the person aggrieved who brings the appeal. These interests are not private rights such as would be protected by a court of equity.

This point can best be illustrated by a consideration of the situation involved in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. There the licensee of an existing station appealed from action of the Commission authorizing the construction of a new station to serve the same community. The appellant urged that the Commission had erred in failing to consider the economic injury which would result to it from the operation of the proposed station. This Court held that such injury gave the appellant standing to appeal under the statute, but did not invalidate the Commission's grant, and that the economic injury which the appellant would suffer need not be considered by the Commission as a separate factor bearing upon whether a grant would be in the public interest. In other words, while financial injury from competition confers standing to appeal, licensees are not entitled to protection from such injury. It is merely the vehicle for getting the licensee into court so that he may "bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." 309 U. S. at 477.

Appellant's position in the instant case is at best no better than that of the licensee in the *Sanders* case. Appellant is the licensee of

a station in Cincinnati, Ohio, and the Commission action complained of shifts a station in Columbus to the frequency on which appellant operates, with the result that there will be some electrical interference with appellant's broadcasting. However, the Commission's action does not infringe the right conferred by appellant's license, namely, that of operating Station WCPO at Cincinnati on 1200 kilocycles with 250 watts power. No right is conferred by the license or statute to serve any particular area. Thus, while the electrical interference suffered by appellant, like the financial injury from competition in the *Sanders* case, possibly gives appellant standing to appeal,[13] no private right is involved and appellant comes into court merely as a sort of King's Proctor to secure correction of asserted errors of law committed by the Commission. Cf. *Colorado Radio Corporation* v. *Federal Communications Commission*, 118 F. (2d) 24, 28 (App. D. C.).

Since persons aggrieved who appeal pursuant to Section 402 (b) (2) do not have any private rights at stake, there is sound policy underlying the omission of Congress to grant to the Court of Appeals the power to issue stays in such cases.[14] It cannot be claimed that the

[13] Whether appellant has standing to appeal is one of the questions raised by the appeal. The court below has postponed decision of this and the other issues raised until after disposition of the petition for a stay order.

[14] Appellant contends (Br. pp. 4 and 5) that the power to issue a stay order is a concomitant to the power contained in

existence of the power should be implied in order to safeguard public rights. By the clear terms of the Act (Sections 307, 309, 319), Congress has committed to the Commission the determination whether public interest, convenience, or necessity would be served by the grant of an application. The Commission must make this determination before making the grant which is appealed from under Section 402 (b) (2). The court is not permitted to substitute its judgment for that of the Commission on this issue even on final judgment. *Supra*, p. 22. To permit it to do so on an interim determination would be inconsistent with the whole scheme of the Act.

The foregoing considerations all point to the fact that there are good reasons behind the withholding of a stay power under Section 402 (b) although such a power is granted under Section 402 (a). The power is properly exercisable in most of the cases covered by Section 402 (a). Under Section 402 (b) such a power would in the main be inappropriate. The failure of Congress to confer the power in Section 402 (b)—(f), therefore, should not be deemed inadvertent.

2. *The legislative history.*—Examination of the legislative history of Section 402 further shows that Congress intended to withhold from the

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Section 402 (e) "to remand the case to the Commission to carry out the judgment of the court." But as shown hereinafter (pp. 33–34), the preservation of the status quo is not necessary for the existence of the power contained in Section 402 (e).

Court of Appeals the power to issue stay orders pending determination of an appeal. In drafting Section 402 Congress had before it and relied extensively on H. R. 7716, 72d Congress,[15] a bill designed to amend the Radio Act of 1927. The bill had been passed in 1933 by both houses but had failed of enactment because of a pocket veto. Section 10 of the bill proposed to amend Section 16 of the Radio Act of 1927 in several important respects. Appeals were to go to the Court of Appeals from orders of the Commission granting or denying an application for a construction permit or a license or for a renewal or modification of a license, and, in addition, from the Commission's action in revoking, suspending, or modifying an existing license. Jurisdiction concurrent with that of the Court of Appeals was vested in the circuit courts of appeals in revocation cases.

Section 16 (f) of the bill, which was applicable both to cases in the Court of Appeals and in the circuit courts of appeals, reads as follows:

> The court may, subject to the foregoing limitation, upon notice to the Commission and to all other parties to the appeal, after hearing, and for good cause shown, enter an order staying action of the Commission under the order appealed from, in whole or in part, upon the giving of a bond by

[15] For example, the statement of the House managers of the bill in the Conference Report on the Communications Act of 1934 (H. Rep. No. 1918, 73d Cong., 2d Sess., pp. 47–49) contains fifteen references to H. R. 7716.

the party applying for the stay in such amount and with such terms and conditions as the Court may deem proper. Pending a hearing upon the application for stay, the Court may enter a temporary stay for a period of not to exceed fifteen days.

The inclusion of these provisions in H. R. 7716 indicates that the failure to include any similar provisions in the Communications Act, except those incorporated in Section 402 (a) by reference to the Urgent Deficiencies Act, was deliberate and that Congress intended to withhold the power to issue stays in cases appealed under Section 402 (b). If Congress had intended the Court of Appeals to exercise such an important power, surely it would not have remained silent when only the year before it had attempted to write into the statute a specific provision conferring that power, with elaborate safeguards governing its exercise. This inference is further strengthened by the fact that in many other statutes establishing a special proceeding for the review of administrative action, Congress has specifically dealt with the matter of stay orders pending determination of the appeal.[16]

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[16] E. g. Securities Act of 1933, 15 U. S. C. § 77 (i); Natural Gas Act, 15 U. S. C. § 717 (r); Bituminous Coal Act of 1937, 15 U. S. C. § 836 (b); Federal Power Act, 16 U. S. C. § 825 (l); Federal Alcohol Administration Act, 27 U. S. C. § 204 (h); Fair Labor Standards Act, 29 U. S. C. § 210 (b); Civil Aeronautics Act of 1938, 49 U. S. C. § 646 (d).

These statutes are of three types. The first kind provides that the taking of an appeal shall operate as a stay unless the

Appellant contends (Br. 11–14) that H. R. 7716 was not designed to confer power on the Court of Appeals to issue stay orders—which power according to appellant the Court already possessed—but rather was intended to condition the exercise of that power by requiring a bond and notice. Appellant cites *General Broadcasting System, Inc.* v. *Bridgeport Broadcasting Station, Inc.*, 53 F. (2d) 664 (D. Conn.), in support of this contention, stating that the inclusion of the stay order provision in H. R. 7716 must be considered in the light of that decision. In the first place, however, it does not appear from the hearings, debates or committee reports on H. R. 7716 that Congress was even aware of the decision in the *General Broadcasting* case. Hence it is difficult to see how that decision could have had any bearing on the objectives of H. R. 7716. In the second place, the holding in the *General Broadcasting* case was that under Section 16 of the Radio Act of 1927 the Court of Appeals had no stay order power. Whether it had such power under the 1930 amendment was

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court otherwise directs (e. g. Federal Alcohol Administration Act, 27 U. S. C. § 204 (h)); the second type specifically authorizes the court to issue stay orders (e. g. Civil Aeronautics Act of 1938, 49 U. S. C. § 646 (d); the third type provides that the taking of an appeal shall not operate as a stay unless specifically authorized by the Court (e. g. Natural Gas Act, 15 U. S. C. § 717 (r)). See also National Labor Relations Act, 29 U. S. C. § 160 (e) and (f), authorizing the court to grant temporary relief or restraining orders on application of the Board.

expressly left open. The *General Broadcasting* case is, therefore, clearly inapplicable.

Appellant also refers to a colloquy between Congressman Linthicum and Congressman Davis, who was chairman of the House Committee in charge of the bill. The colloquy is as follows (75 Cong. Rec. 3682):

> Mr. LINTHICUM. Should there not be some provision by which a station could give bond and then appeal, to determine this question (of suspension)? When they are once suspended that practically ruins the station forever. It seems to me if there was some provision by which they could give bond until they had a hearing upon the appeal, it would be better.
>
> Mr. DAVIS. Well, they may now, under certain conditions, but even after this bill is enacted they may, which, however, is within the discretion of the court to which the case is appealed.
>
> Mr. LINTHICUM. If a station is suspended for a couple of weeks, it is very difficult for it to take its position again.
>
> Mr. DAVIS. Well, it is not nearly as difficult as it would be if the commission revoked their license, which they now have the right to do.

While the quoted passage is far from clear, it is safe to say that neither Congressman conceived the function of Section 16 (f) to be to condition an already existing power of the Court of Appeals. It appears from the passage quoted that Section 16 (f) was proposed in order to

extend protection to existing licensees by providing for a court order to assure them the right to stay on the air pending appeal from a Commission order suspending or revoking their license. This concern for such protection to licensees would be meaningless if—on appellant's assumption—the Court already possessed such power. The requirement of a bond and notice would not be needed for the protection of existing licensees but rather for the protection of the public.

The reason why Congress gave the Court of Appeals a stay order power under H. R. 7716 and withheld it in the Communications Act appears to be quite clear from what already has been said. Under Section 10 of H. R. 7716 the Court of Appeals was to have jurisdiction to review revocations and suspensions of licenses in addition to grants and denials of applications. As has been indicated (*supra*, pp. 20–21), a stay order power may be appropriate in revocation and suspension cases, but not in cases involving the grant or denial of applications. Thus when Congress in the Communications Act made a bipartite division of review of radio matters, it conferred a stay order power in the revocation and suspension cases, which were made appealable to three-judge courts, but did not do so in the cases which were made reviewable in the Court of Appeals.

Appellant also contends (Br. 6–8) that the Court of Appeals issued stay orders under the

Radio Act of 1927 and, until recently, under the Communications Act without objection by the Commission, and that the re-enactment of Section 16 of the Radio Act as Section 402 (b) of the Communications Act without any substantial change indicates that Congress approved the view of the Court of Appeals that it had power to issue such orders.

However, prior to 1930 the power exercised by the Court of Appeals under Section 16 of the Radio Act was administrative and not judicial; the Court of Appeals under that section was a superior revising agency. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. Section 402 did not reenact the original Section 16 but rather Section 16 as amended in 1930 to remove all administrative functions from the Court of Appeals. Hence the issuance of stays by that court under the original Section 16 is irrelevant.[17]

Of the cases decided between 1930 and the enactment of the Communications Act of 1934 not one contains a discussion of the power to issue stay orders. As a matter of fact we have been able to find but one case (*Boston Broadcasting Co.* v. *Federal Radio Commission*, 67 F. (2d) 505 (App. D. C.)) where the granting of a stay order is referred to at all. Even in this case, no dis-

[17] The references to stay orders contained in the Federal Radio Commission's Third and Fourth Annual Reports, cited by appellant (Br. 7), are to orders which were issued under Section 16 before its amendment.

cussion of the problem is made nor does the opinion purport to construe the language of Section 16 as amended. The Court merely refers to the stay order in the last paragraph of the opinion in an indirect manner by declaring that "the stay order entered in this appeal is dissolved" (p. 507).

No such oblique reference in a solitary opinion can possibly be held to constitute a settled construction by the Court of Appeals of the pertinent provisions of Section 16 as amended.[18] There is, therefore, no basis for any presumption that Congress approved the construction urged by appellant. Cf. *United States* v. *Raynor*, 302 U. S. 540.

B. NO OTHER STATUTE CONFERS UPON THE COURT OF APPEALS THE POWER TO ISSUE THE STAY ORDER REQUESTED

Appellant apparently contends (Br. 14–15) that Section 262 of the Judicial Code and Section 33 of Title 18 of the District of Columbia Code (Title 11—208, 1940 ed.) give the Court of Appeals power to issue the stay order requested.

Section 262 of the Judicial Code provides:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts

[18] Cases since 1934 in which the Court of Appeals has issued stay orders have no bearing on the presumption of congressional approval of a settled construction of the statute. The provisions of Section 402 (b) have not been re-enacted since 1934.

> shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 33 of Title 18 of the District of Columbia Code (31 Stat. 1227) provides:

> The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction.

In view of the specific congressional intention reflected in the Communications Act to withhold from the Court of Appeals any power to stay Commission action pending appeal, these general statutes could not in any event be given the effect urged by appellant. But even apart from this specific Congressional disposition of the issue, it is not thought that these "all writs" statutes empower the Court of Appeals to stay Commission action. These statutes, if applicable at all to appeals from the Communications Commission, must be read in the light of the nature of the reviewing functions of the Court of Appeals. As was pointed out by this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, the relationship between the Court of Appeals and the Commission is not that of federal courts *inter se*. The function of the Court of Appeals is limited to the laying bare of any errors of law committed by the Commission. And, as applied to proceed-

ings to review Commission action, the "all writs" statutes would give the Court of Appeals the power to issue only such writs as might be necessary to protect the jurisdiction of the Court to carry out its function of determining whether the Commission has committed errors of law.

Appellant does not suggest how this jurisdiction would be interfered with if during the pendency of an appeal the changes authorized by a construction permit issued by the Commission were to be effected. As a matter of fact, in the instant case, the changes have already been made and for many months WCOL, Inc., has been operating on 1200 kilocycles and with the increased power authorized by the Commission (Appendix C, *infra*, pp. 58–59). It can hardly be suggested that as a result the appeal to the court below is now meaningless. That court can fully exercise its jurisdiction to review the Commission's action in granting the application of WCOL, Inc., whether or not the action of the Commission is stayed in the interim. If on final judgment an error of law is found, the Commission must revise its action in accordance with the decision of the court.

The case of *Omaha & Council Bluffs Street Railway Co.* v. *Interstate Commerce Commission*, 222 U. S. 582 (see also 230 U. S. 324) cited by appellant on page 15 of its brief is not in point. This Court there suspended the enforcement of a rate order of the Interstate Commerce Commission pending appeal from the Commerce Court, and it did so

relying upon Section 716 of the Revised Statutes, which became Section 262 of the Judicial Code, quoted *supra*, pp. 32–33. However, in that case the statute creating the Commerce Court expressly authorized it to stay the Interstate Commerce Commission's action (36 Stat. 542–543), and there was no reason to suppose that Congress intended to deny such power to this Court. Indeed, Section 2 of the same statute provided that this Court might stay the judgment of the Commerce Court upon the appellant's giving of a bond (36 Stat. 542).

CONCLUSION

The certificate should be dismissed on the ground that the question certified is of objectionable generality. If the question is answered, however, it should be answered "No."

Respectfully submitted.

CHARLES FAHY,
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APPENDIX A

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475, and by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C., Sec. 151 *et seq.*:

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * * * *

SECTION 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power

among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

* * * * *

SECTION 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto,

it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject;

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * *

SECTION 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability

of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or

first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * * *

SECTION 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by

any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise

delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an

appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

SECTION 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided however,* * * * No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. * * *

Urgent Deficiencies Act of 1913, c. 32, 38 Stat. 208, 220:

* * * * * *

* * * No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call, to his assistance to

hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. * * *

Judicial Code:

SECTION 239. [28 U. S. C., Sec. 346.] In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and there-

upon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by appeal.

SECTION 240. [28 U. S. C., Sec. 347.] (a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal.

(b) Any ~~case in a circuit~~ court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the United States

Court of Appeals for the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

* * * * * *

SECTION 262. [28 U. S. C., Sec. 377.] The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

District of Columbia Code, title 18, sec. 33, appearing in the 1940 edition as Title 11—208:

The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction.

APPENDIX B

40086

PUBLIC NOTICE
April 2, 1940.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D. C.

In re WCOL, INC., COLUMBUS, OHIO. For Construction Permit. File No. B2-P-2508

DECISION AND ORDER ON PETITION FOR REHEARING

On October 10, 1939, the Commission granted without hearing the application of WCOL, Inc., Columbus, Ohio, for construction permit to use the frequency 1200 kc and increase power from 100 watts to 250 watts, unlimited time. WCOL now operates on 1210 kc, with 100 watts power, unlimited time.

On October 30, 1939, the Scripps-Howard Radio, Inc., licensee of Station WCPO, filed a petition for hearing or rehearing requesting the Commission to set aside its action of October 10, 1939 and designate the application of Station WCOL for hearing.

Operating on the frequency 1210 kc in the State of Ohio at the present time in addition to Station WCOL are WHIZ, Zanesville, 53 miles from Columbus, using 100 watts power, unlimited time; WLOK, Lima, 79 miles from Columbus, using 100 watts power daytime only; and WJW, Akron, 109 miles from Columbus, with 250 watts power, unlimited time. Concurrently with its grant of the

WCOL application the Commission granted WHIZ authority to increase power to 250 watts, contingent upon the change of frequency of WCOL to 1200 kc. Station WLOK has an application pending to increase power to 250 watts and operate unlimited time.

Already assigned to the frequency 1200 kc in the State of Ohio are Stations WTOL, Toledo, Ohio, 120 miles from Columbus, recently granted an increase in power to 250 watts, unlimited time; WHBC, Canton, Ohio, 102 miles from Columbus, using 250 watts power, unlimited time, and WCPO, Cincinnati, 100 miles from Columbus, using 250 watts, unlimited time.

The petition alleges, among other things, that at the present time the closest nighttime station to WCPO on the 1200 kilocycle frequency is 155 miles away and uses 100 watts power; that the action of the Commission with regard to WCOL authorizes the use of 250 watts power by a station 98 miles away; that the required separation to preserve the service area of WCPO is in excess of 244 miles for operation by the interfering station using power of 100 watts and this would be substantially greater with a power of 250 watts; and that the operation of WCOL during evening hours as authorized by the Commission will, therefore, result in real, substantial, and destructive interference throughout a large portion of the present coverage area of Station WCPO and in all directions from its transmitter; that (upon information and belief) "according to standards for the measurement of interference during daytime hours as promulgated by the Commission, the operation of WCOL as proposed will result in destructive interference over

a substantial portion of the coverage area of WCPO, particularly in the direction of Columbus and the present coverage area through which such destructive interference will take place will be more than 500 square miles with the complete loss of WCPO's listening audience in that area"; that by reason of the interference above described, petitioner will be deprived of revenues, its competitive position impaired and the area from which it may draw program talent and program material materially reduced; that Station WCPO will be placed in a position where during evening hours it will not adequately cover the metropolitan district of Cincinnati; that the action of the Commission in granting the application of WCOL adversely affects it without notice or hearing and without any advice to it as to the contentions of WCOL, and the comparative claims of WCOL to the enlargement of its coverage at the expense of the listening audience of WCPO.

Station WCPO, operating on 1200 kc, is classified by the Commission as a local or Class IV station. The Commission's Standards of Good Engineering practice concerning Standard Broadcast Stations contemplate that the nighttime service area of a Class IV station extends to the 4 mv/m ground wave contour (which contour in this case will not extend beyond a few miles from the transmitter of WCPO), and to the 0.5 mv/m ground wave contour during daytime hours (which contour will extend approximately 27 miles from the transmitter). On such local channels the separation between stations operating on the same frequency which will ordinarily be required is the distance necessary in order to permit satisfactory

daytime service to be rendered. This is due to the fact that the phenomena of skywave transmission are such that the interference at night from a station occurs with maximum intensity at distances of 200 to 400 miles from the transmitter, and a much lesser amount of interference will result at shorter distances. With WCOL operating as at present or as proposed, the skywave interference which would be expected to delineate the extent of the interference-free service of WCPO at night originates with stations at considerably greater distances from Cincinnati than Columbus, and, therefore, the operation of WCOL as proposed will not result in any appreciable increase in the interference to WCPO at night.

Station WCPO renders an intermittent service beyond its 4 mv/m contour at night and its 0.5 mv/m contour during the day. At night, some interference may result to the intermittent service area of WCPO. During the daytime, interference will occur to the intermittent service of Station WCPO, and some interference as hereinafter set forth, will occur also within its primary service area, as a result of the operation of WCOL as proposed. Under the Commission's standards, interference in the intermittent service area of a Class IV station caused by the operation of a proposed station does not necessarily preclude the establishment of such proposed station. One of the requisites to a determination that the establishment of a proposed station causing such interference is not in the public interest, convenience or necessity is a showing that 90% of the population to which the existing station renders such intermittent service does not receive primary service

from any other station rendering the same general program service. Such a state of facts is not present in this case. The records of the Commission indicate that the area wherein WCPO renders intermittent service already receives primary service from Stations WLW, WCKY, WKRC, and WSAI. Petitioner's contentions that "the operation of WCOL during evening hours as authorized by the Commission will * * * result in real, substantial and destructive interference throughout a large portion of the present coverage area of Station WCPO and in all directions from its transmitter"; that "Station WCPO will be placed in a position where during evening hours it will not adequately cover the metropolitan district of Cincinnati", and that "the operation of WCOL as proposed will result in destructive interference over a substantial portion of the coverage area of WCPO, particularly in the direction of Columbus, and the present coverage area through which such destructive interference will take place will be more than 500 square miles with the complete loss of WCPO's listening audience in that area" are without merit.

Petitioner's allegations that the grant of increased power to WCOL adversely affects its interests on an economic basis and that because of a reduction in its service area there will be a reduction in the area from which it may draw talent and program material are mere conclusions which are unsupported by any allegation of facts from which such conclusions might reasonably be drawn. It does not follow from the fact petitioner's service area will be somewhat restricted that the increase in power to WCOL would result in such a

diminution of petitioner's revenues as to seriously impair or destroy its ability to continue operation of Station WCPO in the public interest. Nor does it follow from this fact that its ability to procure talent and program material will be affected. The restriction of its present service area does not preclude petitioner from drawing its talent and program material from the same sources as heretofore.

As to petitioner's contention that it is adversely affected "without any notice to it or hearing and without any advice to it as to the contentions of WCOL, the comparative claims of WCOL to the enlargement of its coverage at the expense of the listening audience of WCPO, and other material factors affecting the public interest and WCPO", the Communications Act of 1934 requires the Commission to give notice and an opportunity to be heard only to an applicant prior to denial of his application. There is no requirement in the Act for notice and an opportunity to be heard to others before the Commission may grant an application for construction permit. If the Commission can determine after an examination of an application and all other relevant data that a grant thereof would serve public interest, convenience, and necessity, it is its duty under the Act to grant the application. (Section 309 (a)). In the instant case, the Commission was able to determine from its examination of the WCOL application that the granting thereof would serve public interest, convenience, and necessity, and it, therefore, complied with its statutory duty in granting the same.

Petitioner insists, however, that the grant constitutes a modification or revocation in part of its license because part of the area in which it now

renders service will be curtailed, and that the Commission has no power to do this without giving it notice in writing of such proposed action and the grounds or reasons therefor, together with a reasonable opportunity to show cause why such an order of modification or revocation should not issue. Petitioner's contention appears to be based upon a claim that the Act or its license confers upon it a right to serve a particular number of listeners within a specified geographical area. The Act is devoid of any suggestion of such a right, and the petitioner's license contains no provision expressly or impliedly authorizing petitioner to serve any particular portion of the listening public. The petitioner's license merely authorizes it to operate transmitting equipment on a specified frequency, power and hours of operation. Consequently, it can hardly be successfully contended that the grant of an application the effect of which may be a restriction of petitioner's service area constitutes a modification or partial revocation of petitioner's license. Furthermore, petitioner can hardly contend that it has not been given an opportunity to show cause why such action should not be taken. It had notice of the Commission's action and has, by filing a petition for rehearing, attempted to show why the Commission's order should not become effective.[1] The allegations made in such petition fail to show that the grant of the WCOL application will not serve public interest, convenience or necessity and consequently no cause

[1] The Commission on October 24, 1939, upon petitioner's motion, stayed the issuance of construction permit to WCOL pending determination of this petition for hearing or rehearing.

has been shown why the application should not be granted.

On December 22, 1939, WCOL, Inc., Columbus, Ohio, filed its opposition to the petition of Scripps-Howard Radio, Inc. (WCPO) for hearing or rehearing. Attached to the applicant's opposition is a verified report of a study of interference arising out of the operation of WCOL on the frequency 1200 kilocycles, which has been prepared by the applicant's engineers and filed with the application of WCOL.

Scripps-Howard Radio, Inc., has filed a motion to strike the "study of interference conditions caused by the operation of WCOL on 1200 kilocycles at Columbus, Ohio, December 1939", the basis for which is its contention that the study contained detailed expert opinion and a substantial amount of factual data concerning which WCPO has no information, and the accuracy of which has not been tested by cross examination. The factual data submitted by WCOL are under oath and are attached to its application as a part thereof. The mere fact that it was submitted after the application was filed is immaterial. The Commission may consider it just as though such data were filed simultaneously with the application, or submitted as a written statement of fact under a request of the Commission made pursuant to Section 308 (b) of the Act. In either event, the Commission may consider such information in determining whether the application should be granted or denied, and is under no legal duty to submit the same to the petitioner for cross examination. It should be noted, however, that the opposition with supporting data was served on petitioner, who had an opportunity to submit to the Commis-

sion any information it might have to refute any statement, factual or otherwise, made by the applicant. No such information has been filed with the Commission to date, nor are any facts alleged in the petitioner's motion to strike refuting the factual data submitted by WCOL or questioning the accuracy of such facts. Petitioner has made no request of the Commission for additional time within which to make its own study or submit any factual data in opposition to that submitted by the applicant. Our own study of the data submitted by the applicant indicates that it is substantially correct. Therefore, the motion to strike will not be granted.

In so far as the primary service area of Station WCPO is concerned, appears from the data available to the Commission that WCPO now serves approximately 822,400 persons within its 0.5 millivolt per meter contour. Approximately 20,800 of such persons reside in the area within the contour where interference would be caused by WCOL if operating on this frequency, reducing the number of persons to be served by WCPO to 801,600; that the operation of WCOL as proposed will not interfere with the service of WCPO inside the Cincinnati metropolitan area as defined by the United States Bureau of Census; that, operating as proposed on the frequency 1200 kc the nearest station to WCOL on the same frequency will be approximately 100 miles away instead of 50 as at present, and the interference-free service area of Station WCOL will be extended so as to include 398,500 persons instead of 340,700 as at present, representing an increase of 57,800 persons; that Station WLOK, at Lima, now serves 99,300 persons and, if WCOL were removed from 1210 and permitted to operate on 1200 kilocycles, with 250 watts power, WLOK would

then be able to serve 129,900 persons, or a gain of 30,600 persons. WLOK is the only broadcast station in Lima. Lima has a population of 42,287. It is located in Allen County, which has a population of 69,419, and the nearest station to Lima is located at Fort Wayne, Indiana, 60 miles distant; that the transfer of WCOL from 1210 kilocycles to 1200 would permit the conditional grant of increased power to WHIZ to become effective, thereby improving the service in the Zanesville community as follows: Whereas WHIZ now serves 54,300 persons, it would be able to serve 112,300, a gain of 58,000 persons. WHIZ is the only station in Zanesville, the nearest other stations being located at Columbus; that, in summary, the result of the operation of WCOL as proposed would be an increase of 146,400 persons within the interference-free primary service areas of WCOL, WLOK, and WHIZ, as compared to a loss of 20,800 persons now receiving primary service from Station WCPO.

Thus, upon a comparison of the benefits and detriments sustained in the respective communities, public interest, convenience or necessity will be served by the grant of the application. The Commission has before it all information necessary to a determination of the questions raised by the application of WCOL, Inc. The Petition for Hearing or Rehearing filed by Scripps-Howard Radio, Inc. (WCPO), raises no valid objections which would require us to set aside our grant of the above-entitled application. Accordingly, IT IS ORDERED, this 29th day of March, 1940, that the Petition for Hearing or Rehearing BE, AND IT IS HEREBY, DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary.*

APPENDIX C

42291

July 24, 1940

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C.

In re: WCOL, INC., COLUMBUS, OHIO. For License. File No. B2–L–1154

DECISION AND ORDER ON PETITION FOR HEARING OR REHEARING

On October 10, 1939, the Commission granted the application of WCOL, Inc., Columbus, Ohio, for construction permit to use the frequency 1200 kilocycles with 250 watts power, unlimited time.

On October 30, 1939, Scripps-Howard Radio, Inc., licensee of Radio Station WCPO, Cincinnati, Ohio, filed a petition for hearing or rehearing requesting the Commission to set aside its order of October 10, 1939, granting the application of WCOL for construction permit and to designate said application for hearing. On March 29, 1940, the Commission made its decision and order denying the petition for hearing or rehearing filed by Scripps-Howard Radio, Inc.

On April 14, 1940, Scripps-Howard Radio, Inc., (WCPO) filed its notice of appeal in the United States Court of Appeals for the District of Columbia from the decision of the Commission granting the application of WCOL and requested an order staying the effectiveness of said decision and order pending the termination of the appeal. No action

was taken by the Court on the request for a stay order and the construction permit authorized on October 10, 1939, was mailed the applicant, which completed the construction thereunder and made the required program tests. Thereafter, it made application for a license to cover construction permit.

On May 21, 1940, Petitioner filed in the United States Court of Appeals for the District of Columbia a petition to enlarge the terms of the stay order theretofore requested so as to prevent issuance of the license following construction permit. No action was taken by the Court on this petition.

On June 3, 1940, WCOL, Inc., having made satisfactory proof to the Commission that all the terms, conditions, and obligations set forth in the application and permit were fully met, and there being no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the construction permit which would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission granted its application for license to cover the construction permit pursuant to Section 319 (b) of the Communications Act of 1934.

On June 22, 1940, Scripps-Howard Radio, Inc., (WCPO) filed a petition for hearing or rehearing directed against the issuance of the license to WCOL to cover construction permit in which it is alleged the operation of Station WCOL as authorized by said license "produced interference with the established service of petitioner in accordance with the predictions and computations heretofore set out" (in its petition for hearing or rehearing filed with the Commission, directed against the

grant of October 10, 1939, of the WCOL application for construction permit); and that "such operation during daytime hours produces regular interference in that part of the established and lawful service area of the petitioner in the direction of Columbus, Ohio, beginning at about three miles beyond Montgomery, Ohio, at the 1140 microvolt per meter contour of the petitioner, which interference becomes increasingly severe with the further approach toward the 500 microvolt per meter contour of the petitioner in the direction of Columbus."

In the Commission's decision of March 29, 1940, on the Scripps-Howard Radio, Inc., petition for hearing or rehearing which was directed against the order granting the application of WCOL for construction permit to use the frequency 1200 kilocycles with 250 watts power, unlimited time, the Commission pointed out that the petition failed to show any facts indicating that the grant of the WCOL application would not serve public interest, convenience and necessity; that, on the contrary, the information before the Commission indicated that WCPO, operating on the frequency 1200 kilocycles with 250 watts power, unlimited time, serves approximately 822,400 persons within its 0.5 millivolt per meter contour; that approximately 20,800 of such persons reside in the area within the contour where interference would be cause to the operation of WCPO of WCOL operating on this frequency; that the result of the operation of WCOL as proposed would be an increase of 146,400 persons within the interference-free primary service area of Stations WCOL, WLOK, and WHIZ as compared with a loss of 20,800 persons

now receiving primary service from WCPO; and that, therefore, the proposed interference with WCPO did not constitute a ground upon which the Commission could conclude that public interest, convenience or necessity would not be served by a grant of the WCOL application.

The instant petition for hearing or rehearing which is directed against the issuance of the license to WCOL to cover construction permit merely suggests that operation by WCOL under the grant results in interference in petitioner's present service area, but sets forth no facts in any way indicating that the Commission erred in concluding that "upon a comparison of the benefits and detriments sustained in the respective communities, public interest, convenience and necessity will be served by the grant of the application." Furthermore, no facts are set forth in the petition upon which the Commission could find that the terms, conditions and obligations set forth in the application and permit of WCOL have not been met, nor has the petitioner brought to the Commission's attention any cause or circumstance, arising since the granting of the WCOL construction permit, which would make the operation of such station against the public interest, convenience or necessity.

Accordingly, IT IS ORDERED, this *19th* day of *July, 1940*, that the petition for hearing or rehearing filed by Scripps-Howard Radio, Inc., (WCPO), BE, AND IT IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary*.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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SUPREME COURT OF THE UNITED STATES.

No. 508.—October Term, 1941.

Scripps-Howard Radio, Inc., vs. Federal Communications Commission. } On Certificate from the United States Court of Appeals for the District of Columbia.

[April 6, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here on certificate from the Court of Appeals for the District of Columbia. Judicial Code § 239, 28 U. S. C. § 346. The question certified relates to the power of the Court of Appeals to stay the enforcement of an order of the Federal Communications Commission pending determination of an appeal taken under § 402(b) of the Communications Act of 1934, 48 Stat. 1064, 1093.

The circumstances which induced the Court to certify the question are these: On October 10, 1939, the Commission granted without hearing the application of WCOL, Inc., licensee of Station WCOL, Columbus, Ohio, for a construction permit to change its frequency from 1210 to 1200 kilocycles and to increase its power from 100 to 250 watts. The appellant, Scripps-Howard Radio, Inc., which is the licensee of Station WCPO, Cincinnati, Ohio, operating on a frequency of 1200 kilocycles with power of 250 watts, filed a petition for "hearing or rehearing" requesting the Commission to vacate its previous order and set the WCOL application for hearing. The Commission denied this petition on March 29, 1940, and an appeal followed. In its statement of "reasons for appeal", the appellant claimed that the Commission could not lawfully grant the WCOL application without hearing; that in granting the application the Commission departed from its rules and standards of good engineering practice; that the appellant was entitled to a hearing in order to show that the Commission's action did not serve the public interest since it would result in materially reducing the coverage of Station WCPO and thereby deprive a substantial number of listeners of "the only local regional non-network service" available to them; and that in granting the WCOL

application without hearing, the Commission violated the Due Process Clause of the Fifth Amendment.

The appellant asked the Court of Appeals to stay the Commission's order pending the disposition of its appeal. Even though the Court "had consistently over a long period of years, and without objection on the part of the Commission, issued stay orders" in cases where such orders were found to be necessary, the Commission opposed the issuance of a stay order in this case on the ground that the Court was without power to grant a stay. The application was heard before the Court sitting with three judges, which, with one judge dissenting, upheld the Commission's contention. A motion for rehearing before all six members of the Court was granted. The judges being equally divided on the question of the Court's power to grant a stay, the following question was certified to us:

"Where, pursuant to the provisions of Section 402(b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?"

The Commission suggests that the certificate should be dismissed because of the generality of the question. *Lowden* v. *Northwestern Nat. Bank*, 298 U. S. 160. Read in the light of the preliminary statement certifying the facts which presented the question, *Hill* v. *Wampler*, 298 U. S. 460, 464, the question is limited to the type of order made by the Commission in this case. It is therefore sufficiently specific.

The Communications Act of 1934 is a hybrid. By that Act Congress established a comprehensive system for the regulation of communication by wire and radio. To secure effective execution of its policy of making available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges", Congress created a new agency, the Federal Communications Commission, to which it entrusted authority previously exercised by several other agencies. Under the Radio Act of 1927, 44 Stat. 1162, the Federal Radio Commission had broad powers over the licensing and regulation of radio facilities. The Mann-Elkins Act of 1910, 36 Stat. 539, gave the Interstate Commerce Commission general regulatory authority over

telephone and telegraph carriers. In addition, the Postmaster General was empowered, under the Post Roads Act of 1866, 14 Stat. 221, to fix rates on government telegrams.[1] The Communications Act of 1934 was designed to centralize this scattered regulatory authority in one agency. See Message from the President to Congress, February 26, 1934, Sen. Doc. No. 144, 73d Cong., 2d Sess.; Sen. Rep. No. 781, 73d Cong., 2d Sess., p. 1; H. Rep. No. 1850, 73d Cong., 2d Sess., pp. 3-4.

The provisions for judicial review in the Act of 1934 reflect its mixed origins. Section 402(a) makes the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, pertaining to judicial review of orders of the Interstate Commerce Commission, applicable to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license)". 48 Stat. 1064, 1093. The Urgent Deficiencies Act, which is thus incorporated in § 402(a) of the Communications Act of 1934, provides for review in a specially constituted district court, with direct appeal to this Court. That Act authorizes the district court, in cases "where irreparable damage would otherwise ensue to the petitioner", to allow a temporary stay of the order under review, subject to specified safeguards. 38 Stat. 208, 220.

Section 402(b) of the Communications Act of 1934 provides for review of the orders excepted from § 402(a). It gives an appeal "from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases: (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. (2) By any other person aggrieved or whose interests are adversely affected by any

[1] A summary of the authority vested in the Federal Radio Commission, the Interstate Commerce Commission, and the Postmaster General, and of the extent to which such authority was actually exercised, is contained in Appendix A, Historical Background of the Communications Act of 1934, of the Monograph of the Attorney General's Committee on Administrative Procedure dealing with the Federal Communications Commission, Sen. Doc. No. 186, 76th Cong., 3d Sess., pt. 3; see also Herring and Gross, Telecommunications, pp. 210-45.

decision of the Commission granting or refusing such application." 48 Stat. 1064, 1093. This section follows § 16 of the Radio Act of 1927, 44 Stat. 1162, as amended in 1930, 46 Stat. 844, the relevant portions of which are set forth in the margin.[2] See Sen. Rep. No. 781, 73d Cong., 2d Sess., p. 9; H. Report No. 1918, 73d Cong., 2d Sess., pp. 49-50; remarks of Senator Dill, in charge of the measure in the Senate, 78 Cong. Rec. 8825, and of Representative Rayburn, who occupied the same role in the House, 78 Cong. Rec. 10314.

Thus, in both the Radio Act of 1927 and the Communications Act of 1934, orders granting or denying applications for construction permits or station licenses and for renewal or modification of licenses were made reviewable by the Court of Appeals for the District of Columbia.[3] And with respect to such appeals, both § 16 of the Radio Act and § 402(b) of the Communications Act were silent with respect to the power of the Court of Appeals to stay orders pending appeal. It is upon this silence in the Communications Act that the Commission bases its contention, made for the first time when this litigation arose in 1940, that the Court is without such power.

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[2] "Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license, whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia. . . ." 44 Stat. 1162, 1169.

[3] Where the Commission revokes a station license or modifies a license on its own motion, judicial review is available only under § 402(a) of the Communications Act. The reason for this differentiation appears in the following statement of Senator Dill, who steered the bill in the Senate:

"I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which was granted against them or affecting them when they did not bring the case into court. . . . So we provide that where the decisions of the commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or the permit, or whatever it may be, comes to the commission and asks for a change in his license or asks for a new license, or asks for something to be done by the commission, then if the commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." 78 Cong. Rec. 8825-26. Cf. Sen. Rep. No. 781, 73d Cong., 2d Sess., pp. 9-10.

Section 16 of the Radio Act of 1927 provided for appeals from revocation orders to either the Court of Appeals for the District of Columbia or the District Court of the district in which the station was located. 44 Stat. 1162, 1169.

No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that, as part of its traditional equipment for the administration of justice,[4] a federal court can stay the enforcement of a judgment pending the outcome of an appeal. *In re Claasen*, 140 U. S. 200; *In re McKenzie*, 180 U. S. 536.

Generally speaking, judicial review of administrative orders is limited to determining whether errors of law have been committed. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139-40. Because of historical differences in the relationship between administrative bodies and reviewing courts and that between lower and upper courts, a court of review exhausts its power when it lays bare a misconception of law and compels correction. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144-45. If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made. The existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review. "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case." *Virginian Ry.* v. *United States*, 272 U. S. 658, 672-73; see *Warehouse Co.* v. *United States*, 283 U. S. 501, 513-14.

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[4] Section 262 of the Judicial Code, 28 U. S. C. § 377, empowers the federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This provision appeared in the very first Judiciary Act, 1 Stat. 73, 81-82. Compare District of Columbia Code (1940 ed.) Title 11-208, authorizing the Court of Appeals for the District of Columbia "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." 31 Stat. 1189, 1227.

These controlling considerations compel the assumption that Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review. It is urged that such a manifestation appears in the provisions for judicial review contained in the Communications Act of 1934. Specifically, the Commission contends that since § 402(a) incorporates the provisions of the Urgent Deficiencies Act of 1913 which explicitly authorize and regulate the issuance of stay orders, the omission of any reference in § 402(b) to a power to stay orders under review reflects a deliberate Congressional choice to deprive the Court of Appeals of this power.

The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts. The Commission argues that the silence of Congress, in view of the legislative history of the Act and the nature of the orders reviewable under the Act, qualifies this general authority and is as commanding as if Congress had expressly withheld from the Court of Appeals the power to stay orders appealed under § 402(b).

The legislative history can furnish no support for this contention. Neither the committee reports nor the hearings nor the debates contain any reference to the power to stay Commission orders on appeal. Significance is found in H. R. 7716, 72d Congress, a bill which was passed by both houses in 1933 but which failed of enactment because of a pocket veto. That bill proposed to amend § 16 of the Radio Act of 1927 so as to vest concurrent jurisdiction (with the Court of Appeals for the District of Columbia) of revocation cases in the circuit courts of appeals, rather than in the district courts. The bill also provided that the reviewing court, whether a circuit court of appeals or the Court of Appeals for the District of Columbia, could enter a stay order "upon the giving of a bond by the party applying for the stay in such amount and with such terms and conditions" as the court deemed proper.

It is suggested that if Congress had intended in the Act of 1934 to authorize the Court of Appeals to issue stay orders in appeals

under §402(b), it would not have remained silent when only the year before it had attempted to enact into law a specific provision conferring that power. But H. R. 7716 and the Communications Act of 1934 were not parallel legislative proposals. The former was not a comprehensive legislative scheme for the unification of federal regulatory authority over communications. It proposed merely to amend the Radio Act of 1927 in several minor particulars. See H. Rep. No. 221, 72d Cong., 1st Sess., p. 7; Sen. Rep. No. 564, 72d Cong., 1st Sess., p. 7; Sen. Rep. No. 1004, 72d Cong., 2d Sess., p. 9. The enactment of the Communications Act of 1934, however, came after a message to Congress from the President on February 26, 1934, recommending the creation of a single authority over communication by wire and radio. Sen. Doc. No. 144, 73d Cong., 2d Sess. Earlier in 1934 an interdepartmental committee had made a study of the entire communications situation. Extensive public hearings on the question of regulating the whole field of communications were held by both the Senate and House Committees on Interstate Commerce. It is obvious, therefore, that what Congress undertook to do by the Communications Act of 1934 was entirely different from what it tried to do the previous year in H. R. 7716.

We are told that in drafting §402 Congress had before it and relied extensively upon H. R. 7716, and reference is made to the citations to that bill in the statement of the House managers. H. Rep. No. 1918, 73d Cong., 2d Sess., pp. 47-49. But whatever reliance was placed upon H. R. 7716 by the framers of the 1934 legislation was without relation to its provisions for judicial review. For in that same statement (p. 47) it is said that the "provisions of the Radio Act of 1927 relating to judicial review have been included" in the bill. And, as has previously been noted, even though the Radio Act of 1927 contained no provisions dealing with the authority of the Court of Appeals for the District of Columbia to stay orders of the Commission on appeal, the Court had been issuing stays as a matter of course wherever they were found to be appropriate, without objection by the Commission. *Boston Broadcasting Co.* v. *Federal Radio Commission*, 67 F. 2d 505, decided June 19, 1933.

It is indisputable that, at least since 1930, the Court of Appeals has been staying orders both of the Federal Radio Commission, under § 16 of the Radio Act of 1927, and of the Federal Communications Commission, under § 402(b) of the Communications Act of

1934, whenever stays were regarded as necessary. To be sure, in only one case, the *Boston Broadcasting* decision, *supra*, did the Court of Appeals even refer to the granting of a stay order. The explanation is not hard to find. The power to stay was so firmly imbedded in our judicial system, so consonant with the historic procedures of federal appellate courts, that there was no necessity for the Court of Appeals to justify its settled practice.[5]

The considerations of policy which are invoked are as fragile as the legislative materials are inapposite. It is said that the nature of the orders reviewable under § 402(b) makes the grant of a stay order manifestly inappropriate since a stay would in effect involve the judicial exercise of an administrative function. An example is adduced of an appeal from an order denying an application for a construction permit or a station license, or for modification or renewal of a license. Of course, no court can grant an applicant an authorization which the Commission has refused. No order that the Court of Appeals could make would enable an applicant to go on the air when the Commission has denied him a license to do so. A stay of an order denying an application would in the nature of things stay nothing. It could not operate as an affirmative authorization of that which the Commission has refused to authorize. But this is no reason for denying the Court the power to issue a stay in a situation where the function of the stay is to avoid irreparable injury to the public interest sought to be vindicated by the appeal.

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2) Congress gave the right of appeal to persons "aggrieved or whose interests are adversely affected" by Commission action. 48 Stat. 1064, 1093. But these private litigants have standing only as representatives of the public interest. *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 477. Compare *National Licorice Co.* v. *Labor*

[5] As late as February 23, 1939, the Commission stated its position as follows: "The Commission has not opposed in the past, and does not propose in the future to oppose the granting of a stay or such interlocutory restraining order by this court as may be necessary to protect the appellate jurisdiction of the court or preserve the *status quo* pending determination of an appeal from an order of the Commission, in any case where such a stay or restraining order appears reasonably to be necessary or advisable." Opposition to Petition for Stay Order filed by the Commission in Crosley Corp. v. Federal Communications Commission, No. 7351, Court of Appeals for the District of Columbia, Feb. 23, 1939, pp. 1-2.

Board, 309 U. S. 350, 362-63. That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. An historic procedure for preserving rights during the pendency of an appeal is no less appropriate—unless Congress has chosen to withdraw it—because the rights to be vindicated are those of the public and not of the private litigants. Unless Congress explicitly discloses such an intention we should not lightly attribute to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard. To do so would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. *United States* v. *Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 164. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes.

It is urged that the orders reviewable under § 402(a), as to which the power to grant stays is undeniable, are intrinsically different from those reviewable under § 402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under § 402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under § 402(b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally ~~suspectible~~ Susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commission's order arose out of a proceeding not instituted by the licensee.[6]

[6] See note 3, *supra*.

Judged by its own terms, its history, and the practice under it, the Communications Act of 1934 affords no warrant for depriving the Court of Appeals of the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal challenging its validity. Indirect light is sometimes cast upon legislation by provisions dealing with the same problem in related enactments. No such light is shed here. The numerous laws in which Congress has established administrative agencies for the exercise of its regulatory powers do not disclose any general legislative policy regarding the power to stay administrative orders pending review. Some statutes are wholly silent;[7] some turn a court review into an automatic stay;[8] some provide that the commencement of a suit shall not operate as a stay unless the court specifically so provides;[9] some authorize the reviewing court to grant a stay where necessary.[10] Significantly, the recent Emergency Price Control Act of 1942 explicitly denies the power of the reviewing court to enjoin enforcement of the administrative orders. Pub. Law 421, 77th Cong., 2d Sess.

The various enactments in which the staying power is made explicit, as well as the statutes that are silent about it, afford debating points but no reliable aids in construing the Act before us. One thing is clear. Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war.

We conclude that Congress by § 402(b) of the Communications Act of 1934 has not deprived the Court of Appeals of the power

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[7] E. g., Commodity Exchange Act of 1922, 42 Stat. 998, 1001, 7 U. S. C. § 9; Radio Act of 1927, 44 Stat. 1162; Railroad Retirement Act of 1937, 50 Stat. 307, 315, 45 U. S. C. § 228k.

[8] E. g., Federal Alcohol Administration Act of 1935, 49 Stat. 977, 980, 27 U. S. C. § 204h; Investment Company Act of 1940, 54 Stat. 789, 844, 15 U. S. C. § 80a-42(b).

[9] E. g., Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U. S. C. § 1367; Securities Act of 1933, 48 Stat. 74, 80, 15 U. S. C. § 77i; Trust Indenture Act of 1939, 53 Stat. 1175, 15 U. S. C. § 77vvv; Public Utility Act of 1935, 49 Stat. 803, 834, 15 U. S. C. § 79x; Investment Company Act of 1940, 54 Stat. 789, 844, 15 U. S. C. § 80a-42(b); Investment Advisers Act of 1940, 54 Stat. 847, 856, 15 U. S. C. § 80b-13; Fair Labor Standards Act of 1938, 52 Stat. 1060, 1065, 29 U. S. C. § 210(b); Bituminous Coal Act of 1937, 50 Stat. 85, 15 U. S. C. § 836(b); Natural Gas Act of 1938, 52 Stat. 821, 832, 15 U. S. C. § 717r(c).

[10] E. g., Civil Aeronautics Act of 1938, 52 Stat. 973, 1024, 49 U. S. C. § 646(d); Federal Trade Commission Act of 1914, 38 Stat. 719, as amended, 52 Stat. 111, 113, 15 U. S. C. § 45(c) (authorizing the court to issue such writs as "are necessary in its judgment to prevent injury to the public or to competitors pendente lite").

to stay—a power as old as the judicial system of the nation. We do not of course go beyond the question put to us. We merely recognize the existence of the power to grant a stay. We are not concerned here with the criteria which should govern the Court in exercising that power. Nor do we in any way imply that a stay would or would not be warranted upon the showing made by the appellant in this case.

The question certified to us is answered in the affirmative.

So ordered.

Mr. Justice BLACK took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 508.—October Term, 1941.

Scripps-Howard Radio, Inc., vs. Federal Communications Commission.	On Certificate from the United States Court of Appeals for the District of Columbia.

[April 6, 1942.]

Mr. Justice Douglas, dissenting.

Congress has provided through § 402(a) of the Communications Act of 1934 that in appeals from certain classes of orders of the Federal Communications Commission the appellate court may issue a stay. The order here involved is of a class which is expressly excepted from § 402(a). Sec. 402(b) which provides for an appeal from this class of order contains no provision whatsoever for a judicial stay. Where Congress in one section of an Act has provided for a stay of certain orders but not of others, it has not remained silent on the subject. It has drawn a line. And that line should not be obliterated by us in absence of plain and compelling indications that the purpose of Congress was different from what the face of the statute reveals. There are no such reasons here.

The legislative history gives no comfort to the view of the majority. In drafting § 402 Congress had before it H. R. 7716, 72d Congress. That bill, designed to amend the Radio Act of 1927, had been passed by both houses in 1933 but had failed of enactment because of a pocket veto. Under § 16(f) of that bill orders of the type here in question could be stayed by the appellate court. Congress relied extensively on that earlier bill in drafting § 402. H. Rep. No. 1918, 73d Cong., 2d Sess., pp. 47-49. If Congress had intended the appellate court to have the power to stay this type of order, it hardly seems likely, as the Commission points out, that Congress would have failed to include it, when only the year before it had attempted to write into the statute a specific provision conferring that power. But if we dis-

regard that circumstance and turn to other parts of the legislative history, there are no indications that the line which Congress drew between § 402(a) and § 402(b) was inadvertent or accidental.

Nor are we justified in rewriting the statute to iron out possible logical inconsistencies in the classification of orders which Congress has made in § 402(a) and § 402(b). If we were a legislative committee, perhaps we would not retain in § 402(a) orders which are made by the Commission on its own motion and which modify a station license, since such orders if made pursuant to an application are covered by § 402(b). But to seize on that lack of symmetry here is to miss the forest for the trees. The nature of the run of the orders excepted from the stay provisions of § 402(a) demands respect for the words of the Act. The instant case is a good illustration. *Federal Communications Commission* v. *Sanders Bros.*, 309 U. S. 470, holds that a competitor such as appellant has no private property interest which may be protected on appeal. "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *Id.*, p. 475. Any injury to an existing station as is alleged here "is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license." *Id.*, p. 476. Thus it is manifest that the failure of Congress to extend the stay provisions of § 402(a) to the run of orders of this type makes sense. The Urgent Deficiencies Act, which is incorporated into § 402(a), allows a temporary stay "where irreparable damage would otherwise ensue to the petitioner". 38 Stat. 208, 220. But where appeals under § 402(b)(2), as in the instant case, are not shown to involve private rights, analogies to situations where the power to issue a stay is implied because irreparable damage may be done an appellant whose individual interest has been unlawfully invaded are inapposite. For the same reason, statistics as to the presence of this power in statutes of other administrative agencies are irrelevant, in absence of a showing that in the precise situations there involved no private rights were at stake.

And that leads to a related reason why it will not do to lean on "the historic procedures of federal appellate courts" so that an implied power to issue a stay in this type of case may be found. "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of prop-

erty." *In re Sawyer*, 124 U. S. 200, 210. All constitutional questions aside (*Muskrat* v. *United States*, 219 U. S. 346) we should require explicit, unequivocal authorization before we permitted an appellant who has no individual substantive right at stake in the litigation to obtain a stay to protect the public interest. Repeated attempts of private litigants to obtain a special stake in public rights have been consistently denied: See *Massachusetts* v. *Mellon*, 262 U. S. 447; *Sprunt & Son* v. *United States*, 281 U. S. 249; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Atlanta* v. *Ickes*, 308 U. S. 517; *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295. The attempt to obtain a stay is but another manifestation, albeit oblique, of that same endeavor. Hence, instead of starting from the premise that an "historic power" to issue a stay in this type of case will be readily implied, we should assume just the contrary. Not even long acquiescence or approval on the part of the Commission should lead us to make such a departure from those historic, accepted principles. For that reason alone § 402(b) should be read narrowly and restrictively.

But it is said that Congress entrusted the vindication of the public interest to private litigants. The *Sanders* case properly construed merely means that the Court of Appeals has *jurisdiction* of appeals by a "person aggrieved" or by one "whose interests are adversely affected" by the Commission's decision. § 402(b). But that does not mean that an appellant has a cause of action merely because he has a competing station. Unless he can show that his individual interest has been unlawfully invaded, there is merely *damnum absque injuria* and no cause of action on the merits. *Alabama Power Co.* v. *Ickes*, *supra*; *Greenwood County* v. *Duke Power Co.*, 81 F. 2d 986, 999. And see *Duke Power Co.* v. *Greenwood County*, 302 U. S. 485. Congress could have said that the holder of a radio license has an individual substantive right to be free of competition resulting from the issuance of another license and causing injury. In that event, unlike the situation in *Muskrat* v. *United States*, *supra*, there would be a cause of action for invasion of a substantive right. But as we said in the *Sanders* case Congress did not create such a substantive right. And no facts are shown here which would bring this appeal outside the rule of that case. On that assumption I fail to see how an appeal statute constitutionally could authorize a person who shows no

case or controversy to call on the courts to review an order of the Commission. *A fortiori* he would have no standing to obtain a stay.

Furthermore, the power to issue a stay in this type of case cannot be found in the "all writs" statutes. Judicial Code, § 262; District of Columbia Code (1940 ed.) Title 11-208. As we stated in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, the relationship between the Court of Appeals and the Commission is not that of federal courts *inter se*. ". . . to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." p. 144. The Commission not the courts is the ultimate guardian of the public interest under this Act. The appellate court is limited to a correction of "errors of law". *Id.*, p. 145. The judgment of the Commission not the court determines whether the public interest will be served by an application. *Id.*, pp. 144-145. Hence the power of the courts in this situation to issue writs under the "all writs" statutes should be limited to the protection of its jurisdiction. If, as here, construction of a new station is completed pending appeal by another licensee, the court's jurisdiction is not impaired, though we assume that it has jurisdiction of the appeal and that appellant has a cause of action on the merits. If the Commission has committed an error of law, it must bow to the decree of the court and revise its order. But to allow the court to go beyond that and find an implied power to issue a stay in this type of case is to distort the statutory scheme. 12 Air L. Rev. 224. Jealous regard for the administrative role and function in this field will leave to Congress any enlargement within constitutional limits of the judicial power.

Mr. Justice MURPHY joins in this dissent.